

**DOCKET**

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PROCEEDINGS AND ORDERS

DATE: 0320%

CASE NBR 84-1-05548 CFH  
SHORT TITLE Smith, Larry R.  
VERSUS Jago, Supt.

DOCKETED: Oct 4 1984

Date	Proceedings and Orders
Oct 4 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Nov 15 1984	DISTRIBUTED. November 30, 1984
Dec 3 1984	Response requested. (Due January 2, 1985 - NONE RECEIVED)
Dec 24 1984	Order extending time to file response to petition until January 16, 1985.
Jan 22 1985	Brief of respondent Jago, Supt. in opposition filed.
Jan 24 1985	REDISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Feb 25 1985	REDISTRIBUTED. March 1, 1985
Mar 11 1985	REDISTRIBUTED. March 15, 1985
Mar 18 1985	Petition DENIED. Dissenting opinion by Justice White with whom The Chief Justice and Justice Brennan join. (Detached opinion.) Justice Powell OUT.

CONTINUE :

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**PETITION  
FOR WRIT OF  
CERTIORARI**

84-5548

IN THE SUPREME COURT OF THE UNITED STATES

Larry Raymond Smith  
Petitioner,  
vs.  
A.R. Jago, et al.  
Defendant's

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SUPREME COURT, U.S.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I Larry Raymond Smith Petitioner, respectfully asks this Honorable Court for leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in pauperis. Petitioner has previously been granted leave to so proceed in both the District Court and the Court of Appeals. Petitioner's affidavit in support of this motion is attached hereto.

/s/ Larry R. Smith Petitioner

AFFIDAVIT

I Larry R. Smith being first duly sworn according to law depose and say that I am the Petitioner-plaintiff in the above entitled required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore, and that I believe I am entitled to redress

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Page two (2)

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this court are true.

1. Are you presently employed? (No)
  - (a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
  - (b) If the answer is no, state the date of your employment and the amount of the salary and wages per month which you received.  
500 per week.
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source. (No).
  - (a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.
3. Do you own any cash or checking or saving account. (NO)
  - (a) If the answer is yes, state the total value of the items owned.  
(None)
4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing) (No)
  - (a) If the answer is yes, describe the property and state its approximate value.
5. List the persons who are dependent upon you for support and state your relationship to those persons. (3) Children:

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ [Signature]  
Petitioner

Subscribed and sworn to before me this  
\_\_\_\_ day of \_\_\_\_\_, 1984.

/s/ [Signature]  
Notary Public

NOTARY PUBLIC  
STATE OF OHIO  
EXPIRES 12, 1988

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1984

LARRY RAYMOND SMITH

Petitioner,

vs.

A.G. JAGO et al

Defendant's

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED  
STATES SIXTH CIRCUIT COURT OF APPEALS, CINCINNATI,  
OHIO

Respectfully Submitted,

/s/ [Signature]  
Larry Raymond Smith  
Inst. No. #165-730  
London Correctional Institution  
Post Office Box 69  
London, Ohio 43140-0069  
Plaintiff-Appellant

IN THE SUPREME COURT OF THE UNITED STATES

TERM 1984

No. \_\_\_\_\_

\_\_\_\_\_  
LARRY RAYMOND SMITH

Petitioner,

vs.

A.R. JAGO, et al.

Defendant's

\_\_\_\_\_  
PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Larry R. Smith, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth District entered on the 19 day of July, 1984.

OPINION BELOW

The court of appeals entered its memorandum decision affirming the denial of petitioner Habeas Corpus on the 19 day of July, 1984. A copy of the memorandum is attached hereto as appendix.

JURISDICTION

On the 19 day of July, 1984, the court of appeals judgment affirming the denial of the petitioner's Appeal. And the jurisdiction of this court is invoked under Title 28 United States Code section 1254(1) and 42 U.S.C. Section 1984.

CONSTITUTIONAL PROVISIONS INVOLVED UNITED STATES CONSTITUTION  
AMENDMENT'S SIXTH AND FOURTEENTH AMENDMENTS AND PETITIONER DUE  
PROCESS RIGHTS:

INDEX TO DOCUMENT REFERENCE IN APPENDIX

DESCRIPTION OF ITEM	RECORD ENTRY NO.	APPENDIX PAGE
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(1) Whether the lower courts failed to take in to consideration the following:

That the trial court improperly refused to allow petitioner to call two alibi witnesses, and take into consideration that petitioner had 3 sworn affidavits supporting the fact of counsel failure to comply with the trial courts discovery rule.

And the lower court failed to consider that the witness with a criminal records was allowed to give testimony and the other two witnesses that did not have criminal records was not allowed to be called as a witness nor a alibi witnesses.

(2) The lower court failed to consider that the petitioner if left the courtroom voluntarily, he should have the right to return back to the courtroom voluntarily.

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STATEMENT OF THE CASE

Larry Raymond Smith was charged with rape under § 2907.02 of the Ohio Revised Code. He was indicted by the Muskingum County Grand Jury on October 14, 1981. He was arraigned in Muskingum County Common Pleas Court on October 22, 1981. Both of these dates appear on the Muskingum County Common Pleas Clerk of Courts Criminal Docket.

Trial began November 12, 1981 and concluded November 16, 1981. An entry filed on November 16, 1981 at 9:29 sentenced Mr. Smith to seven to twenty five years based on the jury verdict finding him guilty.

Mr. Smith filed a Notice of Appeal Pro Se on November 16, 1981.

Mr. Smith was represented at his trial by court-appointed lawyer, Robert Graham of Graham & Graham of Zanesville based upon an affidavit of indigency.

Mark Fleagle of Levion, Richardson & Fleagle was appointed to handle the appeal. Mr. Fleagle stepped aside on acceptance a position with the Muskingum County Prosecutor's Office at which time the current counsel was appointed.

The defendant filed a great many motions on his own behalf, including a Motion in Limine, a Petition for Relief Before Judgment, A Request to the Court to Subpoena Witnesses, a Petition to Have Another Judge Assigned, a Motion for Adequate Access to Law Library and Typing Paraphernalia, a Complaint against the Sheriff, two of his Deputies, and presiding Common Pleas Judge, and a parole officer, a Petition for Writ of Habeas Corpus, a Petition for a Change of Venue, two Petitions requesting the dismissal of his counsel, and several other motions.

His court-appointed counsel filed Motions for Discovery, responded to the State's Request for Discovery, and filed a Notice of Alibi and other motions.

During trial, the defendant personally renewed some of his Motions, including the Motion That Witnesses Be Allowed To Testify and the motion that his counsel withdraw and that he be allowed to serve as his own attorney. Except for the Discovery Motion and the court's allowance that one of the witnesses could testify, all of the other of defendants motions were denied against defendant.

During the trial, the defendant requested and was granted permission to voluntarily remove himself from the proceedings.

STATEMENT OF FACT AND ISSUES

Larry Raymond Smith was tried to a jury under § 2907.02 of the Ohio Revised Code on a charge of rape. The trial began November 12, 1980, and an entry filed November 16, 1981 at 9:29 a.m. sentenced Mr. Smith to seven to twenty five years based on a jury verdict of guilty. A notice of Appeal was filed by Mr. Smith pro se on November 16, 1981.

At the trial the victim testified that someone of the same build and height as Mr. Smith had raped her on the evening of November 14, 1980. She stated that she was sitting in her car in the parking lot of Ohio University Zanesville at about 9:30 on the evening of the 14th, letting her car warm up, when a man wearing a ski mask or toboggan opened the door and forced her to move across the front seat to the passenger's side. He then drove her car to a secluded spot on a country road, approximately two to five minutes away. Adams Circle, the street where Defendant and his family lived in an apartment intersects with Adams Lane, the country road, and the secluded spot where the assailant parked the car is approximately 800 feet from the Defendant's apartment. (Tr. pp. 35-39, 45, 90)

After turning the car off, the assailant lit up a cigarette, smoked a little of it, and then put it out. He turned on the victim, and according to her testimony, put a knife to her throat and told her that he would kill her if she did not have intercourse with him. He partially undressed her and forced her to have oral and vaginal sex. He then got out of the car and told her to drive away, even telling her she was about to drive into a ditch and instructed her as to the only route back to Adams Lane. (Tr. pp. 42-45)

The primary evidence that linked Mr. Smith to the crime were two fingerprints taken from the victim's glasses. The victim testified that the rapist had removed the glasses from her face and placed them in the back seat and that they had not been removed from the back seat until the police searched the car for evidence. The fingerprints were identified at the trial by Louis G. Hupp, a special agent for the Federal Bureau of Investigation, as those of Mr. Smith, based upon a comparison of Mr. Smith's fingerprints from an arrest card. (Tr. pp. 49-50, 79)

The state introduced a "Kool" cigarette which was discovered in the victim's car a week to ten days after the incident. The State produced records from the Maskingum County Jail showing that the Defendant had smoked that brand of cigarettes prior to the time the State informed defense counsel they intended to introduce a "Kool" cigarette as evidence. (Tr. pp. 42, 231)

Testimony from Detective Sergeant Steve Welker, who was one of the investigating officers, indicated that he attempted to question Mr. Smith on numerous occasions and he had not been able to discover his whereabouts. Detective Welker also testified that he had searched the Smith apartment and car several times after obtaining consent from the Defendant's wife and that he had removed items of personal property from their apartment with her consent. He also testified that he went to the apartment almost daily between the 15th of November, 1980 and the early part of January, 1981 and was unable to contact the defendant any of the times he was there even though the defendant's car was always there at the residence through the 20th of December, 1980. (Tr. pp. 91, 104)

Mr. Smith was arrested in Jacksonville, Florida, on January 28, 1981. He was held in Florida until he was extradited by the State of Ohio in September, 1981. After being arraigned in Maskingum County, he spent most of the time until the trial at the Columbus Correctional Facility. He was returned to Maskingum County on the 10th of November, 1981 arriving at the Maskingum County Jail at approximately 4:00 P.M. for a trial which began on November 12, 1981 at 9:00 A.M.

The witnesses testified for the defense. The Defendant and Richard Drzewiecki. Mr. Drzewiecki stated that he had been in Florida in November of 1980 and had been contacted by the defendant concerning a motorcycle he was selling. He stated that he sold the motorcycle on or about the 18th of November, 1980 and that he had had conversations with the defendant for a period of one or two weeks prior to that time. (Tr. pp. 200)

The Defendant testified, denying his guilt in connection with this matter. He stated the he arrived in Florida in October of 1980 and stayed there until he was transferred back to Ohio after being extradited. While being cross-examined, the Defendant was removed from the courtroom at his own request after explaining to the Judge that the Judge's decision not to allow two of his witnesses to testify was depriving him of a fair trial. He spent the rest of the trial in the Muskingum County Jail until he was returned for the reading of the verdict. (Tr. pp. 222, 246)

The issues in this case that must be decided by this Court of Appeals are whether or not the defendant will be held to the technical standards of discovery statute in calling witnesses who would have testified to the alibi defense already raised by the defendant.

This Court also must determine whether or not the manner in which the defendant was allowed to leave the courtroom was unconstitutional because the trial judge placed conditions upon the defendant's return.

#### ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT DEFENDANT TO CALL TWO WITNESSES.

THE COURT ERRED WHEN IT PLACED CONDITIONS UPON DEFENDANT'S RIGHT TO RETURN TO THE COURTROOM AFTER THE DEFENDANT INDICATED THAT HE WISHED TO BE ALLOWED TO VOLUNTARILY ABSENT HIMSELF FROM THE TRIAL.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT DEFENDANT TO CALL TWO WITNESSES.

The Defendant was returned to the Muskingum County Jail on the day before the trial at approximately 4:00 P.M. according to the Defendant. The hand-written motion in limine filed by the defendant on November 12 the day of the trial refers to the defendant being presently incarcerated at the Columbus Correctional Facility.\* Shortly after his return to Zanesville, he met with his defense attorney to discuss the case for the next day. At that time Mr. Smith informed his attorney that he had three witnesses he wished to call at the trial. The record Transcript, page 14, indicates that the attorney for the Defendant orally informed the prosecutor's office that the three witnesses would be called by the defense and formally filed discovery on the 12th of November listing the witnesses named.

One of the witnesses was permitted to testify, a Mr. Richard Drzewiecki. This witness had been incarcerated with the defendant although the witness had been never convicted of any felony. The other two witnesses's testimony was proffered by the defense attorney at Transcript, pages 248-249:

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\*Counsel for appellant has not discovered evidence in the record to indicate when the defendant was returned to Muskingum County. The defendant in a conference explained that he had been returned at 4:00 on the day before the trial. The Transcript, page 14, line 9 refers to a conference the morning before the trial between the defendant and his attorney. Several motions filed by the defendant, including the motion in limine, were filed on the morning of trial and appear to have been prepared by the defendant while at the Columbus Correctional Facility. The Muskingum County Jail records indicate the defendant was returned on November 10th for the November 12th trial.

Mr. Graham: Your Honor, if either of these individuals had been permitted to testify their testimony would have been nearly identical. Mrs. Lear Smith is the mother of the defendant Larry Raymond Smith and Mrs. Lear Smith would have been able to tell the Court that during the months of October, November and December of 1960 she resided in Zanesville, Ohio in the family home and on her telephone she received telephone calls from her son who called collect from Florida and that these phone calls more specifically did occur during the month of November. The testimony of Mrs. Karen Clapper would have been identical to that in that Mr. Larry Smith called her home during the months of October, November and December, calling collect, and those calls being made from Florida. And with that that would be the end of my proffer as to their testimony.

Attached as Exhibit "A" is a copy of the phone records filed by the defendant on November 12, 1981 at 8:30 A.M. which would have been introduced with the testimony of Mr. Smith and Ms. Clapper.

All three witnesses would have testified to the same fact, the guilt of the defendant. Since the witnesses who were not permitted to testify would have testified that the defendant was in the State of Florida, the trial court abused its discretion in refusing to allow their testimony. The trial court did allow the testimony of one witness who had been incarcerated with Mr. Smith. It is unclear from the record whether the two other witnesses had ever been incarcerated or had any felony records. If they did not, then the State would not have been able to attack their credibility by showing the fact of incarceration or conviction.

Two Ohio cases deal with the discretionary allowance of the court in permitting witnesses to testify who are not listed in discovery furnished to the other side. Both of these cases permit the prosecution to use witnesses that they have not informed the defendant they would call. The first case, State v. Edwards, 49 Ohio St. 2d 31 (1976), which was overturned by the Supreme Court of the United States, discusses the subject in Part IV at 49 Ohio St. 2d 41. This case was overturned by the U.S. Supreme Court as to the death penalty imposed by the trial

court at 438 Md. 211, 57 LEd 2d 1155, 95 A. Ct. 247.

In the *Ede* case, the defendant complained that the trial court had erred in permitting the State witnesses to testify on the name addresses of the witness was not furnished to the defendant.

The Ohio Supreme Court in deciding the proposition of error was not well taken bases its ruling upon the evidence that the prosecutor's failure was inadvertent. The witness list furnished the defendant contained the name of patrolman Mack Newberry who was the partner of David Davis, the witness who was not listed who testified. The State was precluded from calling Newberry due to his having a heart attack the night before trial and Davis's testimony was identical to that of another witness, the coroner's investigator. The court held that since defense counsel did not move for a continuance that he waived the right to object that he did not have sufficient time to prepare for cross-examination. "In absence of such a motion, the trial court properly concluded that defense counsel was prepared to go forward at that time... Moreover there is little reason to believe that appellant was ill prepared and surprised by Davis's testimony." 49 Ohio St. 2d 43.

The case of *State v. Mitchell*, 47 Ohio App 2d 61 (1975) also involved a failure to disclose the name of a witness. The Court of Appeals for Clark County in *Syllabus No. 2* refers to the unintentional and inadvertent failure to divulge the name of the witness and the fact that disclosure of the name of the witness would, in no way, have aided in the preparation of the defense.

The case involves a trial and conviction for three counts of uttering and publishing a forged instrument. It proceeds from an arrest of two individuals who were found with checks drawn on various banks in the names of various companies on accounts no longer open, cash, a check writer, and other evidence.

Four witnesses testified who were not identified to the defense and the court held at 47 Ohio App 2d 75 that it was clear from the records that the prosecutor's inaction was not willful and was merely an oversight and at worst a case of ineptness.

The first witness was a bank teller who had been subpoenaed and the subpoena was a matter of public record in the file in the clerk's office, which the court found, put the defendant's counsel on notice as to the likelihood that she would testify. Another teller was listed on an earlier subpoena but was not listed on the more recent subpoena which contained the other teller's name.

The other two witnesses were not listed since the prosecution was apparently unaware until the day before the trial that the detectives they had subpoenaed to testify were not the proper members of the police force who had observed the circumstances and should testify. The third witness was a detective and the fourth was a policeman who took the defendant's fingerprints. The prosecutor had thought that other members of the police force were the proper parties to testify.

Proper objections were made by defense counsel to all of these witnesses. In response to the objection to the detective, the counsel for the defendant was asked what he would have done to challenge the witnesses testimony if he had known in advance that the witness would be called. The defense counsel replied twice, "I don't know."

The court held from this that no showing of prejudice was made.

The Court at 47 Ohio App 2d 77 in giving its rationale for upholding the admission of these witnesses testimony discussed the lack of prejudicial error to the defendant and comes to the conclusion that a fair and impartial administration of justice occurred. As part of this, the court relies upon its determination that two of the witnesses had testified at an earlier preliminary hearing so that the defendant was aware of their testimony and the other two witnesses testified to matters of a procedural nature.

At 47 Ohio App 2d 78 the court draws an analysis which would apply to the present case where it holds:

"(I) it is difficult to conceive of any additional matter which defendant might have developed if he had actually been notified by the prosecutor as to their names and addresses... It is thus clear that defense counsel knew all about the pertinent parts of the State's case well in advance of the trial."

In the present case, the State was on notice that it would have to respond to an alibi defense. Since the witness who was allowed to testify testified as to the alibi defense, and since the other two witnesses would have testified as to the alibi defense, it is clear that the prosecutor knew he would have to convince a jury that the alibi defense was not valid. A new witness would have been placed on the prosecutor had the other two witnesses been allowed to testify.

Two more cases where the prosecutor was allowed to introduce witnesses not listed under the federal rule of criminal procedure are cited as additional authority in the Mitchell case, supra. In the Mitchell case, the Court of Appeals sets up a two prong test to determine if the defendant was prejudiced by the action of the trial court. In order to show prejudice, the defendant would have been able to show that he could have utilized the knowledge that a witness would testify to reveal a weakness in the State's case or to more effectively present a credible defense establishing his innocence, or both, 47 Ohio App.2d 794

The Court states that the purpose of discovery procedure is to prevent surprise and not to prevent the introduction of evidence that the other side could have discovered. The Court holds that it would have been unfair to the State to refuse to admit the evidence and therefore to admit the evidence would not have aided the merits of the defendant's defense.

In the present case defendant sought to introduce evidence relative to a substantive defense properly raised, alibi. Attached to the discovery with the names of the witnesses were copies of the Ohio Bell Telephone long distance call register. The two witnesses who were not permitted to testify would have testified to the same subject as the witness who did testify. The State would have not been required to defend against any additional defense since the alibi issue was already before the Court. The State cannot allege surprise. The State would have been required to challenge the alibi defense whether one, three or ten

witnesses had testified. Since the jury might have believed the witnesses as to alibi, the only difference is that the State might have had a more difficult time proving guilt beyond a reasonable doubt and might not have been able to convince a jury to convict the defendant. Since the defendant is entitled to have the State prove guilt beyond a reasonable doubt and since his witnesses were ready and willing to testify, as indicated in the record, he was denied the right to make a full defense.

To follow the analysis of the Court in Mitchell, supra, the two pronged test that applied to the defendant in that case also applies in this case. The evidence would have added to the showing that there was a weakness in the State's case and would have much more effectively presented a credible defense, especially given the collateral attack made by the prosecution on the credibility of the witness who did testify. It is not clear from the record whether or not the other two witnesses had a criminal record. If they did not have a criminal record or if they had never been incarcerated then the attack on the credibility would have been limited. Since the defendant was not in Muskingum County until shortly before trial, the court should have taken that fact into consideration in making this decision as to the technical requirements of discovery. It is apparent from the record that Mr. Graham met with his client the day before trial when the witnesses were disclosed to Mr. Graham. This is not a case where the defendant is free on bond or even is incarcerated in a local jail. These factors should mitigate the strict compliance with the rules of discovery.

The fact that the attorney for the defendant did not ask for a continuance in this matter should not allow this court to fail to address the issue of the fairness of the trial. The Court may know from its experience that the scheduling of criminal cases is done with an eye towards a speedy trial statute. When jurors are called, courts are more reluctant to grant continuances since they greatly inconvenience the jurors.

This Court of Appeals should also take judicial notice that the manner in which cases are scheduled for trial in Muskingum County differs from the way

they might be scheduled in the more populated counties. In Muskingum County, it is uncommon for more than one jury trial to proceed at one time. Jurors are called for the particular case that is scheduled for trial and are not chosen from a larger panel that is regularly called for an extended period of jury duty. Once notice of trial are mailed to them, the courts are reluctant to grant continuances. Once the jurors are present in the courtroom, the court is even more reluctant to grant a continuance.

#### SECOND ASSIGNMENT OF ERROR

THE COURT ERRED WHEN IT PLACED CONDITIONS UPON THE DEFENDANT'S RIGHT TO RETURN TO THE COURTROOM AFTER THE DEFENDANT INDICATED THAT HE WISHED TO BE ALLOWED TO VOLUNTARILY ABSENT HIMSELF FROM THE TRIAL.

At transcript, pages 242-246, Defendant voluntarily asks to remove himself from the courtroom due to the court's refusal to allow two of his witnesses to testify, see First Assignment of Error.

At transcript, page 243, lines 20 and 21, the Court announces a recess.

At transcript, page 244, a discussion is recorded between the attorneys, the judge, and Defendant out of hearing of the jury. It appears from the record, Transcript, page 251, lines 21 and 22, that the jury was returned to the courtroom at 3:05. From this, counsel for Appellant draws the conclusion that the discussion referred to at page 244 et. seq. occurred during recess.

At transcript, page 244 line 5 through 7, the Court asks the Defendant if he wishes to withdraw from the case to which the defendant admits, "yes." At transcript page 246, lines 1 through 19, the Court instructs the Defendant as to the consequences of his being permitted to remove himself from the courtroom. At lines 11 through 19, the Court says the following:

I might point out before you leave for the record that if you should desire to return to the courtroom at any time with the understanding that you would cooperate with your counsel and refrain from any further outbursts, then the Court would discuss that with you at that time and I would probably bring you back. Do you understand what I'm saying?  
(Emphasis added)

At Transcript, page 252, lines 1 through 7, the Court explains to the jury that the Defendant has been removed from the courtroom at his own request:

Members of the jury, I would like to inform you the trial will proceed at this time but I think in order so that you understand the situation, the defendant Mr. Smith has voluntarily requested that he not be present for the remainder of the trial and the Court has granted his request.

Counsel for Appellant maintains that the court's manner of explaining the situation to the defendant was error since it may have given the impression to the defendant that he would not be allowed to return unless the court affirmatively held that he would comply with certain conditions. In addition, the court never made a finding that Mr. Smith was not cooperating with his attorney or that he was engaged in further outbursts. The record does reflect a conversation between the Defendant and the judge but there is no finding in the record that there were "outbursts". Further, the disagreements between counsel for the defendant and the defendant do not appear in the record to be cause for the Court to impose conditions upon the Defendant's return, absent a finding that the defendant should be removed as opposed to a finding that the Defendant could voluntarily remove himself.

Various cases in Ohio deal with the presence of the Defendant in the courtroom during the trial.

The case of Jones v. State, 29 O. St. 208 (1875) holds that it is error for the court to instruct the jury in the absence of the accused, while the accused is in jail under the order of the court.

The case of Elythe v. State, 47 O. St. 234 (1890) holds that the Revised Statutes §7285 and §7301 does not require the actual presence of the accused. In Elythe, a jury view was conducted and the defendant had the opportunity to attend and declined and the court held that the privilege of attending was sufficient and that the judge was not bound to compel him to accompany the jury.

The case of State v. Grisafulli, 135 O. St. 87, 13 O. O. 440 (1959) holds that it is a right and privilege of a defendant to be present when a jury instruction is given. The Court holds that the rule promulgated in Jones v. State supra, is still valid and approved and follows the Jones case. At 13 O. O. 442, the Court holds that the issue decided does not involve voluntary absence from the trial by one who is not imprisoned or under restraint.

The case of State v. Abrams, 39 O. St. 2d 55 (1974) holds in Syllabus 1 that, "A defendant in a criminal case has a right to be present when, pursuant to a request from the jury during its deliberations, the judge communicates with the jury regarding his instructions."

Despite this expansive statement upholding the Jones and Grisafulli cases, the Supreme Court of Ohio holds that the failure of the defendant to be present when the judge was asked by the jury into their deliberations room is not prejudicial error. Three dissents are included as part of the case which argue that the Ohio law is to the effect such a situation is automatically prejudicial to the defendant.

The majority distinguishes the Jones and Grisafulli cases on the basis that the judge's only contact with the jurors was to explain to them that he would not give them any further instructions but that they would have to reread his original charge on the subject, according to an affidavit filed by the judge in the Court of Appeals and referred to at 39 O. St. 2d 55.

Based upon this relatively innocuous contact, according to the majority, they hold that the error is not prejudicial.

This case can be distinguished from the present case since a significant portion of the trial proceeded without the defendant's presence. In the present case, the Defendant conceivably could have changed his mind during the recess and might have decided to return to the courtroom for the continuation of the trial had the judge's statement to the defendant not placed certain conditions upon the Defendant's return.

In the Abrams case, the three dissents argue that the court should not inquire as to the question of prejudice because the error is presumptively prejudicial and therefore presumptively reversible error.

The majority in the State v. Abrams case does not overturn the Jones case which was approved and followed in Grisafulli. The majority instead examines the conduct of the trial judge to ascertain whether or not the conduct is sufficient to lead to prejudice. The Court bases its holdings on the fact that the additional instructions requested were not given.

In the Abrams case, supra, the majority states that the Jones case, supra is approved in the Grisafulli case, supra.

In Jones v. State at 26 O. St. 210, the court holds that error will be presumed when an instruction is given to the jury out of the hearing of the defendant.

It is the right of the plaintiff in error to be present at each and every instruction given to the jury as to the law of the case. This right was denied to him by reason of his imprisonment under the order of the court; and without inquiry as to the correction of the instruction so given in his absence, it will be presumed that he was prejudiced thereby.

Nor was the irregularity cured by the presence of his counsel at the time the additional instruction was given, and his failure to make objections. The right of the accused to be present on the trial of such case can not be waived by counsel. (Emphasis added)

Since the Ohio Supreme Court does not overrule the case of Jones v. State but merely distinguishes the fact situation in the Abrams case, it is presumed by Appellant that the holding quoted above is still valid as the Ohio Supreme Court's statement on the absence of the defendant from the courtroom.

The cases deal with the ability of an attorney to waive his client's right to be present. These cases are State v. Delcorpe, 66 J. App. 381, 41 O. O. 476 (1949) where the court held that the counsel could not waive the defendant's presence and State v. Williams, 19 O. App 2d 234 (1969) where the court held at 19 O. App 2d 243 that the defendant's attorney could not waive defendant's right to be present.

In the article on Criminal Law at 25 O. Jr. 3d 88116 et seq. page 235 et seq. there is a discussion of the requirement of the presence of the accused. The article states that under the confrontation clause of the United States Constitution that the accused is guaranteed the right to be present in the courtroom in every stage of the trial. The article also discusses the waiver or loss of this right and at 25 O. Jr. 2d 116, page 243, quoted from the United States Supreme Court case, Illinois v. Allen, 397 US 337, 25 L. Ed 2d 353, 90 S. Ct. 1057 as authority for the statement that the defendant can lose his right to be present if he has been removed due to his disruptive behavior.

The United States Supreme Court in the case of Illinois v. Allen 397 US 537 22 L Ed 2d 353, 90 S Ct 1557, reh den 398 US 913, 26 L Ed 2d 80, 90 S Ct 1684(1970) involves a case where the trial judge had the defendant physically removed from the courtroom.

The majority opinion delivered by Mr. Justice Black at 397 US 538 holds that the Sixth Amendment to the United States Constitution which provides that the accused shall enjoy the right to be confronted with witnesses who will testify against him has been made binding upon the states through the Fourteenth Amendment under the cases of Pointer v. Texas and Lewis v. United States, which are cited in the Allen case.

The issue before the Court is whether an accused can claim the benefit of this constitutional right to remain in the courtroom while "he engages in speech or conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial." 397 US 538.

The facts in the Allen case indicate that the defendant threatened the judge's life, threw the file of his attorney on the floor, argued in an abusive and disruptive manner, threatened that there was to be no trial due to his control of the events, and protested when his attorney made a motion to exclude witnesses from the courtroom.

Defendant was returned to the courtroom during various parts of the state's case for purpose of identification and used vile and abusive language. The trial judge, even after all of these outbursts still made it clear to the defendant that he could return to the courtroom if he agreed to behave.

The United States Supreme Court holds at 397 US 543 that the defendant can lose his right to be present if, after being warned, he continues disruptive behavior of such a manner that the trial cannot be carried on with him in the courtroom. But, the Court also holds that he can reclaim the right to remain in the courtroom if he is willing to behave.

The Court suggests that there are three ways to handle an obstreperous defendant by punishing him, citing him for contempt, removing him from the courtroom.

The Court holds at 397 US 547:

It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial... But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct pursued before the Illinois trial court in this case.

Based upon facts so overwhelming as these, the Supreme Court allowed the trial court to proceed in the absence of the defendant.

In the present case, there is nothing in the record to show that the defendant

conducted himself in any manner which would fall under the standards set in Allen. Even the slightest limitation to his right to return to the trial would necessarily be limited to his conduct. Since no finding of his conduct was made by the trial court and since there is no holding by the trial judge that his behavior was so noisy, disorderly, and disruptive that it was exceedingly difficult or wholly impossible to carry on the trial, then the conditions put on the defendant's return were prejudicial as a matter of constitutional right.

In the Allen case, the trial judge allowed the defendant to be returned to the courtroom on several occasions for identification and then to be present through the remainder of the trial, principally his own defense. The trial court initially also brought the defendant back into the courtroom after his first removal. A defendant who was as disruptive as the defendant in Allen is not the defendant portrayed in the record in the present case. The record does not show that the trial judge in the present case spoke to the defendant several times at length in a courtroom manner as to the requirements of the law, but this trial judge in the present case did not hold that the defendant should be removed from the courtroom for cause, he merely allowed the defendant to remove himself from the courtroom.

This Court of Appeals cannot ignore the effect that the removal of a defendant or the voluntary absence of a defendant in a criminal felony trial has upon a jury. There is that is why the Supreme Court of the United States refers to the fact that it is not pleasant to have to hold the punishment of a defendant from his own trial, even if it is only for a part of his own trial.

Rule 43 of the Ohio Rules of Criminal Procedure provides that a trial may proceed despite the voluntary absence of a defendant. Rule 43 of the Federal Rules of Criminal Procedure also provide that the voluntary absence of the defendant shall not prevent the continuation of the trial.

Neither of the rules addresses the issue in the present case which is once the defendant has voluntarily absented himself from the courtroom whether or not the court may place conditions upon his return. Because the rule in Ohio is not specific as to this occurrence, the cases referred to above are binding upon this Court of Appeals since they address themselves to the constitutional right that a defendant has to be present at his trial.

An annotation at 21 ALR Federal 906, Sufficiency of Showing Defendant's "Voluntary Absence" From Trial For Process of Criminal Procedure Rule 43 Authorizing Continuance of Trial Notwithstanding Such Absence, by H.S. Foreman, Jr., J.D. at page 906, et seq. discusses voluntary absence by the defendant.

At § 5 (a) at 21 ALR Fed. 919, the article discusses two cases where the defendant was absent from the courtroom while in custody of the United States Marshall. The cases are Evans v. United States, 284 F. 2d 393 (1960), CA 6 Mich) and Gross v. United States, 325 F 2d 629 (1963, CA DC). In both of these cases the Court of Appeals held that the defendant had not voluntarily absented himself from the trial given the manner in which he was detained and contrasted the removal with the situation where the defendant remains free to come and go as he chooses within the courtroom.

In the Gross case, the court required that before there was an intelligent and competent waiver that the defendant should be brought before the court and advised of his constitutional rights and that the nature of his waiver be examined by the trial judge.

In the same article at § 5(b) at 21 ALR Fed. 919-921, are cases that discuss the situation where the defendant voluntarily asks to be removed from the courtroom. In the case of Carson v. United States, 325 F.2d 625 (1963, CA DC), the defendant asked to be removed from the courtroom, was given an opportunity to change his mind, and informed of the nature of his right to be present and of the possible advantages to him.

The Gross case supra, suggests that the defendant sign a waiver or at least make an on record statement in open court. The Gross case can be distinguished as to this fact when one examines what actually was said in the present case.

In the present case, the defendant's response that he wished to be removed from the courtroom was followed by the judge imposing conditions upon his return. The question of whether the defendant would have asked to be removed had he known of the conditions is a question which cannot be answered by counsel for appellant.

Since there is nothing in the records to show that the court held that the defendant's behavior was sufficient under the test of Illinois v. Allen, supra, then the defendant's removal from the courtroom entitles the defendant to return to the courtroom whenever he decides to, the placing of conditions upon that return was prejudicial error. Since the defendant was in custody and was incarcerated in the County Jail, his return would have required a request by the defendant to the sheriff or deputy sheriff that he be allowed

to return to the courtroom. The defendant may have been of the opinion after hearing the judge place conditions upon his return that he could not return, so he may have decided not to make that request. When all these factors are considered, it is clear that defendant's absence was initially voluntary but that it was enforced by the court making the absence involuntary and making it prejudicial to the rights of the defendant.

#### CONCLUSION

The Assignment of Error in this case relates to decisions of the trial judge which limited the defendant's ability to present a vigorous defense and which may have caused the defendant to remain in the Muskingum County Jail during the portion of the trial after he voluntarily removed himself. The conditions placed upon his return by the judge may have convinced him that it would not be likely that the judge would allow his return and he may have foregone returning to the courtroom.

Both of the Assignment of Error raised by the Appellant relate to the ability of the defendant to have a fair trial is the cornerstone of our criminal justice system.

In the absence of a fair trial, the defendant's conviction must be overturned.

This Court of Appeals should take judicial notice that when the trial judge has already denied the defendant's Motion to Allow Witnesses to Testify and the witnesses are present and willing to testify, just how likely would he be to grant a continuance so these same witnesses could testify after proper notice to the State, especially when he would then have to send the jury home?

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief for defendant-appellant has been served upon the Attorney General, State Office Tower 26th Floor, 30 East Broad Street, Columbus, Ohio 43215 by regular U.S. Mail on this \_\_\_\_\_ day of \_\_\_\_\_, 1982.

1st Supplement

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

LARRY RAYMOND SMITH  
Petitioner

vs.

Civil Action No. C-2-82-481

DAVID E. JACO, Capt.  
Respondent.

COMPLAINT AND PRAYER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under the provisions of 28 U.S.C. §2254. This matter is before the Court on the petition, return of writ, transcript of proceedings in State v. Larry Raymond Smith, No. 81-3 (Muskogee Cty. C.P. Ct. Nov. 1981), and the briefs and exhibits of the parties.

Petitioner was indicted by the January, 1981 term Muskogee County, Ohio Grand Jury for one count of rape in violation of §2907.02, Ohio Revised Code. Petitioner was tried to a jury which found him guilty as charged. On November 16, 1981 petitioner was sentenced to a term of seven (7) to twenty-five (25) years imprisonment.

Petitioner directly appealed his conviction to the Court of Appeals for Muskogee County, Ohio alleging the following assignments of error:

1. The trial court abused its discretion in refusing to permit the defendant to call two witnesses.
2. The court erred when it placed conditions upon the defendant's right to return to the courtroom after the defendant indicated that he wished to be allowed to voluntarily absent himself from the trial.

On August 3, 1982 the Court of Appeals overruled petitioner's assignment of error and affirmed the judgment of the trial court.

Thereafter, petitioner sought review in the Supreme Court of Ohio. On February 2, 1987, the Court overruled petitioner's motion for leave to appeal and granted and dismissed the appeal for want of a substantial constitutional question.

Petitioner alleges that he is in custody of respondent in violation of the Constitution of the United States in that:

1. The trial court abused its discretion in refusing to permit the defendant to call two witnesses.
2. The court erred when it placed conditions upon the defendant's right to return to the courtroom after the defendant indicated that he wished to be allowed to voluntarily absent himself from the trial.
3. The evidence was unlawfully removed and fabricated.

Petitioner's third ground for relief has never been presented to the Ohio Courts. A state prisoner is required to exhaust all available state judicial remedies before he may seek redress by way of petition for federal habeas corpus. Picard v. Connor, 404 U.S. 270, 275 (1971). If his constitutional claims have not been fairly presented by any procedure available in the state courts, his claims have not been exhausted, 28 U.S.C. § 2254 (b), (c).

Petitioner's factual allegations concerning his third ground for relief are as follows:

The primary evidence that linked the defendant to the crime were the two fingerprints taken from the victim's glasses. The fingerprints were removed from the glasses, and the glasses was (sic) returned to the (sic) victim the next day.

As evidenced by the trial record, it is petitioner's position that his fingerprints which were allegedly taken from the victim's glasses, were not taken from these glasses at all. Rather, petitioner asserts that the fingerprints were removed from his personal property, which he claims were illegally removed from his home by the sheriff's Department.

Under Ohio law, constitutional issues cannot be considered in post-conviction proceedings under § 2953.21 of the Revised Code where they have already been or could have been fully litigated, either during trial or direct appeal. Koster v. Dickinson, 594 F.2d 581, 586 (6th Cir. 1979); State v. Perry, 70 Ohio St. 3d 36, 39 (1982).

Petitioner was aware of his evidentiary claim with respect to the fingerprints at the time of the trial. This is evidenced by the fact that he filed a motion to suppress that evidence, which was overruled by the trial court. Thus, although he had an opportunity to fully litigate the issues both at trial and on direct appeal, petitioner failed to pursue the matter. The claim is therefore not cognizable in a post-conviction proceeding under §2953.21 of the Revised Code. Id.

It is not disputed by respondent that petitioner is precluded from raising the claim in any other state court proceedings. Accordingly, the Court concludes that petitioner has exhausted all available state remedies with respect to his third ground for relief as required by 28 U.S.C. §2254 (b),(c).

## I

The facts of the case, as presented at trial, are as follows:

On the evening of November 14, 1980 Kaern Merry was attending an accounting class at Ohio University in Zanesville. After the class was dismissed at 9:00 p.m., she remained in the building to discuss some questions with her professor. At approximately 9:30, she left the building and proceeded to her car, which was parked in an adjacent lot. As she sat in her car warming the motor up, a man approached from behind. He opened the driver's door and directed Ms. Merry to move over to the passenger's side of the car.

The man, who was wearing a ski mask, drove the car to Adams Circle, where he pulled off the road into a small turnoff. He stopped the car some ten to twenty yards from the street and sat smoking a cigarette. When Ms. Merry attempted to leave the car the man placed a knife at her throat and told her that he would kill her if she did not have sexual relations with him. As the man undressed Ms. Merry, he removed her glasses and threw them in the back seat of the car. The man then sexually assaulted Ms. Merry and raped her. He subsequently left the car, directing Ms. Merry how to drive away from the area so as to avoid a ditch. Within one-half hour of the assault, the rape was reported to the police.

Throughout their investigation, the police treated petitioner as a suspect. He lived within 800 yards of Adams Circle, the site of the assault. He was known by the police to own a ski mask of the kind described by Ms. Merry. Further, his height, weight, and body build were similar to the description Ms. Merry gave of her assailant.

Petitioner's name was sent, along with lifts of the fingerprints obtained from Ms. Merry's glasses, to the F.B.I. in Washington, D.C. There the fingerprints were positively identified as those of the petitioner. He was subsequently arrested in Jacksonville, Florida.

At trial, the state's case consisted primarily of Ms. Merry's testimony, along with other physical evidence connecting petitioner to the crime: the close proximity of his home to the scene of the rape, the fact that the petitioner smoked the same brand of cigarettes which was later found in Ms. Merry's car, and the identification of his fingerprints which were found on Ms. Merry's glasses.

Petitioner's alibi defense was that he was in Florida from the end of September 1980 until his arrest there in January, 1981. Richard Drzewiecki testified that he met petitioner in Jacksonville, Florida during late October, 1980. He saw him at least 3 times a week through the date of the rape. He had no specific recollection of petitioner's whereabouts on November 14, 1980. On cross-examination, Mr. Drzewiecki admitted that he and petitioner were incarcerated together while petitioner was awaiting extradition from Florida to Ohio on the rape charge.

## II

Petitioner's first claim is that the trial court abused its discretion in refusing to permit him to call two witnesses at trial depriving him of his right to fair trial and to fully develop his defense.

After providing full discovery, the state requested reciprocal discovery from the defense pursuant to Rule 16 (c) of the Ohio Rules of Criminal Procedure. The trial court ordered the defense to provide full discovery by entry filed October 30, 1981. At approximately 4:00 p.m. on the day prior to the trial, petitioner provided the state with the

the name of Richard Drzewiecki, an alibi witness.

On the morning of trial, the state was advised of the names of two additional alibi witnesses, Karen Clapper and Lura Smith. Petitioner's counsel proffered that Lura Smith, petitioner's mother, and Karen Clapper, his sister, would have testified that during October and November, 1980 they each received collect telephone calls from petitioner in Florida. Petitioner also offered a telephone record or records supporting this proffered testimony.

Petitioner's attorney informed the trial court that petitioner had withheld these names from him until the late hours of the day preceding trial. The trial court permitted Mr. Drzewiecki to testify, but precluded petitioner from calling Ms. Clapper or Mrs. Smith. The State court of appeals held that this ruling was properly within the scope of the trial court's discretion. Respondent submits that the trial court's ruling with regard to the requirements of Rule 16 of the Ohio Rules of Criminal Procedure is exclusively within the provisions of the state judiciary.

Petitioner contends that he should have been held to the technical requirements of the discovery rules with regard to notifying the state of his alibi witnesses. He indicated that he was incarcerated in Columbus until the day preceding the trial, which was held in Jacksonville. He asserts that, for this reason, he had insufficient opportunity to raise the matter with counsel. However, petitioner's attorney states on the record at trial that he had discussed the case with his client on a number of occasions, and that he had repeatedly asked for the names of witnesses who could establish a defense. Petitioner refused to cooperate with him. Petitioner did not mention his mother and sister to defense counsel until the day before trial.

Petitioner further reasons that by providing the state with the names of Mr. Drzewiecki, he placed the state on notice that it would be required to respond to an alibi defense.

In a habeas corpus proceeding, a United States District Court does not exercise direct review over state court decisions. Rather, the scope of federal habeas review is confined to errors which are of constitutional dimension. *Ball v. Arn*, 596 F. 2d 123, 125

(10th Cir. 1976). Generally, state rulings on the admission or exclusion of evidence do not raise constitutional issue. Burke v. Epler, 512 F. 2d 221, 223 (6th Cir. 1975), cert. denied, 423 U.S. 937 (1975); Reese v. Caldwell, 410 F. 2d 1125, 1126 (6th Cir. 1969); Reppel v. Fuchso, 358 F. 2d 338, 340 (6th Cir. 1966), cert. denied, 385 U.S. 962 (1966). However, a trial court evidentiary ruling may render the trial so fundamentally unfair as to constitute a denial of federal rights. Logan v. Marshall, 680 F. 2d 1121, 1123 (6th Cir. 1982); Gillihan v. Rodriguez, 511 F. 2d 1182, 1191-2 (10th Cir. 1977); Bell v. J.T. Supra, 536 F. 2d at 125.

The right to present witnesses in one's behalf is a fundamental right made applicable to the states by the due process clause of the Fourteenth Amendment. Chambers v. Mississippi, 410 U.S. 294 (1973); Washington v. Texas, 368 U.S. 14 (1967). However, the right is not absolute; the state may properly condition the admissibility of evidence upon rules which are designed to further legitimate state interests.

The Supreme Court has recognized that states have a legitimate interest in preventing a criminal defendant from concocting a last minute alibi. Wardius v. Oregon, 412 U.S. 470, 474-479 (1973); Williams v. Florida, 379 U.S. 78, 81 (1970).

However, state procedural requirements must conform to the limits of the Constitution. The issue this court must consider is whether petitioner's trial was rendered fundamentally unfair by the trial court's decision to exclude the testimony of his alibi witnesses as a sanction for failure to comply with the court's discovery order pursuant to Rule 16(c).

The question of whether the exclusion of relevant evidence, such as that provided by an alibi witness, as a sanction for non-compliance with discovery rules violates constitutional principles has been expressly left open by the Supreme Court. Wardius supra, 412 U.S. at 83 n. 14; Williams supra, 379 U.S. at 472 n. 4. The circuit courts have split on the issue, some holding that the Sixth Amendment forbids the exclusion of relevant evidence as a sanction to enforce discovery rules against criminal defendants, United States v. Davis, 639 F. 2d 239, 243 (5th Cir. 1981); see, United States v. Watson, 669 F. 2d 1374, 1383 (11th Cir. 1982) while others hold that such conditions do not violate the fundamentals of due process. United States v. Smith, 524 F. 2d 1288 (D.C. Cir.

1975); Adler v. Crouse, 357 F. 2d 317 (10th Cir. 1966).

In United States v. White, 583 F. 2d 899 (6th Cir. 1978), the Sixth Circuit examined the issues of whether a trial court abused its discretion in excluding defense alibi testimony to sanction non-compliance with the alibi witness disclosure provisions of Rule 12.1, Fed. R. Crim. P. There the defendant first offered the testimony of alibi witnesses after both the prosecution and the defendant had rested their cases. While observing that the trial court has the discretion to rule on the admissibility of evidence, the court noted that the interest of the defendant in having a fair trial must be carefully balanced against the interest of avoiding surprise and delays. The Court enumerated several factors to consider in striking this balance:

(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for non-disclosure, (3) the extent to which the harm caused by non-disclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, (5) other relevant factors arising out of the circumstances of the case.

583 F. 2d at 902, quoting from United States v. Myers, 590 F. 2d 1036, 1043 (5th Cir. 1977). The Court of Appeals held that the trial court did not abuse its discretion under Rule 12.1 in excluding the defense's alibi witnesses. The constitutionality of Rule 12.1 was not considered because the defendant did not contend that the compulsory notice provision denied him due process or a fair trial. 583 F. 2d at 901, n. 3.

Although the factors enumerated in the White decision were employed to determine whether the trial court had abused its discretion in making an evidentiary ruling, they provide a useful framework for analysis of petitioner's constitutional claim. They are particularly relevant in that the underlying interests are identical in each instance: the fundamental right to a fair trial balanced against the interest of the state avoiding the unfair surprise of an eleventh-hour alibi defense.

Consideration of these factors leads us to conclude that the trial court's evidentiary ruling did not deprive petitioner of a fair trial.

The prosecution in this case was severely prejudiced by petitioner's failure to disclose the names of Ms. Clapper and Ms. Smith until the morning of trial. Had they been

permitted to testify, the prosecution would have been deprived of any opportunity to interview the witnesses or investigate their representations. The prosecution would have been thereby prevented from developing any meaningful cross-examination.

Perhaps more importantly, this is not a case in which the evidence was excluded solely as the result of the failure of petitioner's counsel to comply with the discovery procedures. See Cox v. Cardwell, 464 F. 2d 639, 644 (6th Cir. 1972). Counsel for petitioner informed the court that the names of these witnesses had been deliberately withheld by petitioner until the day before the trial, in spite of repeated requests by counsel for the "names of anybody who could help". Despite petitioner's assertions to the contrary, his attorney had visited him on numerous occasions both in Columbus and Zanesville, and petitioner had ample opportunity to discuss this matter with counsel.

In fact, counsel for petitioner made numerous motions to the court requesting that he be allowed to withdraw as counsel, for the specific reason that petitioner had refused to cooperate and assist in his own defense. The Court admonished petitioner on several occasions regarding his lack of cooperation with counsel. Since petitioner deliberately thwarted his counsel's efforts to provide him with a fair defense, he cannot now complain that he has been denied a fair trial due to an evidentiary ruling which came as a direct result of his failure to cooperate.

Moreover, the trial court did not exclude all of the alibi evidence. Petitioner testified in his own defense, and Mr. Drazwiecki was also permitted to testify regarding petitioner's alibi. However, in light of the testimony of the state's witnesses and the fact that petitioner's fingerprints were found on the victim's glasses, it is apparent that the jury did not believe the alibi testimony.

It is doubtful that the jury would have believed the alibi testimony of the two additional witnesses who were both members of petitioner's family. See White, supra 583 F. 2d at 902.

We agree with the Fifth Circuit that the exclusion in a criminal case of relevant, probative, and otherwise admissible evidence solely for non-compliance with a discovery rule is an extreme sanction. United States v. Davis, 639 F. 2d 239, 243 (5th Cir. 1981).

However, we believe that there are overriding policy considerations supportive of the trial court's determination in this case. The discovery rules were designed specifically to prevent the occurrence of events such as are presented in this case. The interest of the State in avoiding the concoction of last minute alibis by criminal defendants was compromised in this case by a deliberate withholding of information on the part of the petitioner. His two alibi witnesses were both family members, so he certainly knew of their identities and whereabouts. He had ample opportunity to notify counsel of his alibi defense and witnesses. The Criminal Rules were adopted to serve the purpose of ensuring a full and fair trial for all parties in a criminal action. A defendant who deliberately attempts to subvert the policies and provisions of these rules cannot be heard to complain that his trial was unfair when such an attempt has been obstructed.

For the reasons discussed above, the Court concludes that petitioner was not denied a fair trial when the trial court excluded the testimony of his two alibi witnesses as a sanction for his deliberate failure to comply with its discovery order.

### III

Petitioner's second claim for relief is that the trial court erred when it placed restrictions on his right to return to the courtroom after he requested that he be allowed to voluntarily absent himself from the trial.

Petitioner became quite agitated after trial court refused to permit him to call his two alibi witnesses. See discussion, *infra*. He engaged in several outbursts with the court, prosecutor and spectators while on the witness stand. Subsequent to his direct testimony and during cross-examination, petitioner requested that he be allowed to remove himself from the courtroom.

Out of the presence of the jury, the following dialogue took place between the court and petitioner:

THE COURT: All right. Over the objection of the prosecuting attorney and over the recommendation contrary of that the Court is going to grant that request due to the fact that you are the defendant in this case and if you wish to remove yourself from the courtroom, that is your request and that is in the interest of justice. If you wish the Court will proceed with

the trial in your absence and on the defendant may be removed at at this time. I might point out before you leave for the record that if you should desire to return to the courtroom at any time with the understanding that you would cooperate with your counsel and refrain from any further outbursts, then the Court would discuss that with you at that time and I would probably bring you back. Do you understand what I am saying?

REMARKS THE WITNESS NODDED HEAD INDICATING YES.  
(Transcript at 246).

Petitioner contends that the Court should not have placed these conditions on his return in light of the fact that no finding was made that petitioner failed to cooperate with his attorney or that he was engaging in outbursts.

Respondent argues that under Ohio law the conduct of the trial is within the discretion of the trial judge and that such a question is not cognizable in a federal habeas corpus action.

The right of a criminal defendant to be present during trial proceedings is essential to the fundamentals of due process.

In Illington v. Allison, 250 U.S. 76 (1919), the court observed "that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering its verdict."

Waller v. United States, 402 U.S. 39, 38 (1975). The Sixth Amendment right of confrontation is so fundamental as to be part of the 'due process of law' guaranteed to defendants in state criminal proceedings by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965); Estelle v. California, 402 U.S. 606 (1975).

However, the right to be present during trial proceedings is not absolute, and may be waived by the defendant. Illinois v. Allen, 397 U.S. 337, 343 (1970); Isard v. Ross, 291 U.S. 97, 99 (1934). If the defendant knew or should have known of his right to be present, his voluntary absence from the proceedings presents no constitutional violation. Taylor v. United States, 414 U.S. 17, 19-20 (1973); Bian v. United States, 442, 445 (1972).

In holding that a defendant's conduct may justify his forced removal from the courtroom, the Supreme Court noted that there was nothing unconstitutional in the procedure of allowing the defendant to return to the courtroom "as soon as the defendant is willing

to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Illinois v. Allen, 397 U.S. 337, 343 (1970) sub. denied, 398 U.S. 915 (1970). The same is true for cases in which the defendant has voluntarily removed himself from the courtroom.

The trial court has the right and responsibility to control the conduct of all persons who appear in the courtroom. The trial judge certainly requires nothing unduly burdensome when he asks only that the defendant refrain from disrupting the proceedings and make some effort to cooperate in his own defense in order to be allowed to return to the courtroom. Accordingly, the Court finds that petitioner's second claim is without merit.

#### IV

Petitioner's third ground for relief is that evidence connecting him to the crime was "unlawfully removed and fabricated". Petitioner contends that the fingerprints linking him to the crime were not found on the victim's glasses, but were obtained from his personal property taken during searches of his home. At trial, petitioner testified to his belief that the fingerprints were obtained from objects which were removed from his home during illegal searches conducted by the police.

The United States Supreme Court held in Stone v. Powell, 428 U.S. 269, 494 (1976) that:

where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search and seizure was introduced at trial.

The United States Court of Appeals for the Sixth District has determined that the application of Stone v. Powell, supra, requires a two part analysis:

Initially, the district court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a Fourth Amendment claim. Second, the Court must determine whether presentation of the claim was in fact frustrated because of the failure of that mechanism.

Biley v. Gray, 674 F. 2d 522, 526 (1982).

The Court of Appeals further held in Biley v. Powell, supra, 674 F. 2d at 526 that the Ohio procedural mechanism for consideration Fourth Amendment claim provides an

adequate opportunity for review of those claims. Therefore, our inquiry turns to whether presentation of petitioner's claim was frustrated by a failure of that mechanism.

The Court has reviewed the suppression hearing and concludes that petitioner was permitted fully and fairly to present his fourth Amendment claims. Thus, petitioner is not entitled to relief in federal habeas corpus on this basis.

With regard to the allegation that the evidence in this case was fabricated petitioner has failed to point to any evidence which would substantiate his claim. The Court has carefully reviewed the hearing on the motion to suppress and the fingerprint testimony adduced at the trial. Petitioner's counsel cross-examined each witness at length regarding the origin of the fingerprints. The jury apparently found that there was sufficient evidence to establish that the fingerprints found on the victim's glasses were those of petitioner. Overall, there is nothing in the trial record suggestive of improper conduct on the part of the police or prosecutor, & claim for relief in a habeas corpus proceeding must rest on something more substantial than conclusory allegations unsupported by the record.

The Court holds that petitioner's third claim for relief does not raise the possibility of constitutional error and is therefore not cognizable in habeas corpus. Accordingly, petitioner's third claim for relief is DENIED.

Therefore, the court RULES that the petition is without merit; and, therefore, it is DENIED.

This action is hereby DISMISSED. The clerk of Court shall enter JUDGMENT for respondent.

/s/  
United States District Judge

No. 83-3524

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

JUL 19 1984

JOHN P. HEHMAN, Clerk

LARRY RAYMOND SMITH,  
Petitioner-Appellant,

v.

ARNOLD R. JAGO, SUPT.,  
Respondent-Appellee.

ORDER

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BEFORE: ENGEL and WELLFORD, Circuit Judges; and HORTON,  
District Judge\*

This Ohio State prisoner appeals from a district court judgment dismissing his habeas corpus petition filed under 28 U.S.C. § 2254. Petitioner attacked his 1981 jury conviction for rape for which he was sentenced to serve seven to twenty-five years. Petitioner alleged the following three grounds in his petition: 1) the trial court improperly refused to allow him to call two alibi witnesses; 2) the trial court improperly placed conditions on his right to return to the courtroom after he voluntarily absented himself from the courtroom; and, 3) proofs of his fingerprints were illegally fabricated and admitted into evidence. The district court dismissed the petition as to the first two grounds on the merits and declined review of the third ground.

On appeal, the petitioner argues that admission of the testimony from his alibi witnesses would not have placed any additional burden on the prosecutor as the court was already allowing the admission of testimony from another alibi witness which also showed that petitioner was in Florida and not in Ohio at the time of the rape. Secondly, petitioner argues that the trial court should not have placed conditions on his return to the courtroom because he left the courtroom voluntarily and not because he had

\* The Honorable Odell Horton, U.S. District Judge for the Western District of Tennessee, sitting by designation.

exhibited any disruptive behavior. Petitioner does not raise his third issue on appeal, which he had raised in the district court.

Upon review, this court concludes that the district court properly dismissed petitioner's habeas petition for the reasons given by it. The trial court clearly did not render petitioner's trial fundamentally unfair by refusing to permit the petitioner to call his mother and sister as two additional alibi witnesses (neither was proffered to be able to testify as to his whereabouts on the day or night of the rape). Cf. Logan v. Marshall, 680 F.2d 1121, 1123 (6th Cir. 1982); Moore v. Howell, 548 F.2d 671, 672 (6th Cir.), cert. denied, 431 U.S. 971 (1977). Application of the factors which this court enumerated in its discussion on an almost identical issue raised in United States v. White, 583 F.2d 899, 902 (6th Cir. 1978), shows no abuse of discretion nor a denial of fundamental fairness in the trial court's ruling. The disclosure of the two additional names on the day of trial would not have provided the state with sufficient time to interview the witnesses or to investigate their representations. Furthermore, petitioner's trial counsel informed the court that the names had been deliberately withheld by petitioner until late in the day before the trial. This occurred despite repeated requests by counsel for names of anybody who could help his cause. (See App. at 165). Notwithstanding the exclusion of the testimony, the alibi defense was placed into the record for the jury to consider by another witness who appeared as being more objective than petitioner's mother and

sister. Finally, the evidence of guilt was substantial. Petitioner's home was close to the scene of the crime. Petitioner smoked the same brand of the cigarette found in the victim's car, and, most damaging, petitioner's fingerprints were found on the victim's eyeglasses, which were removed from the victim during the course of the rape.

Regarding petitioner's second issue, it is observed, as the district court so noted, that the right to be present during trial proceedings is not absolute and may be waived by the defendant. Illinois v. Allen, 397 U.S. 137, 143, reh. denied, 398 U.S. 915 (1970); Snyder v. Massachusetts, 291 U.S. 97, 98 (1934). And, as the Supreme Court so observed in Illinois v. Allen, *supra*, 397 U.S. at 143, there is nothing unconstitutional in the procedure of allowing the defendant to return to the courtroom "as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Clearly, it is a natural and reasonable extension of this principle to apply it in a case where the defendant voluntarily absents himself from the courtroom following outbursts during the trial, thereby obviating the need to establish obstreperous behavior. The conditions placed on petitioner's return in this case were not unreasonable, arbitrary or capricious. The decisions rendered in Evans v. United States, 284 F.2d 393 (6th Cir. 1960) and in Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963),

relied upon by petitioner, are clearly distinguishable on their facts; and the decision rendered in Pearson v. United States, 329 F.2d 425 (D.C. Cir. 1963), rather than supporting petitioner's arguments, supports the trial court's decision to grant petitioner's request to leave after the court discussed the matter with all concerned. (The petitioner absented himself over the objections of the prosecutor and his counsel's advice.)

Finally, petitioner is deemed to have abandoned his third issue raised in the district court. David v. Maggio, 706 F.2d 569, 571 (5th Cir. 1983); United States v. Brucino, 662 F.2d 450, 462 (7th Cir. 1981), cert. denied, 103 S. Ct. 1205 and 1235 (1983); McGraw v. United Ass'n of Journeymen and Apprentices, 341 F.2d 705, 710 (6th Cir. 1965). The search and seizure claim, moreover, clearly is unreviewable in this habeas action. Riley v. Gray, 674 F.2d 522 (6th Cir.), cert. denied, 103 S. Ct. 266 (1982).

For these reasons, this panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The district court's judgment is, accordingly, affirmed pursuant to Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

John P. Milunovich  
Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

JUN 28 1983 *Bl*

KENNETH J. MURPHY, Clerk  
COLUMBUS, OHIO

LARRY R. SMITH

Petitioner

vs.

Civil Action C-2-83-481

ARNOLD R. JAGO, Supt.

Respondent

OPINION AND ORDER

☒ Sg.  
☒ Asst. Sg.  
☒ Clerk  
☒ Sec'y  
☒ Asst. Sec'y  
☒ Asst. Dir.  
☒ Asst. Dir.  
☒ Asst. Dir.  
☒ Asst. Dir.

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under the provisions of 28 U.S.C. §2254. This matter is before the Court on the petition, return of writ, transcript of proceedings in State v. Larry Raymond Smith, No. 81-3 (Muskingum Cty. C.P. Ct. Nov. 1981), and the briefs and exhibits of the parties.

Petitioner was indicted by the January, 1981 Term Muskingum County, Ohio Grand Jury for one count of rape in violation of §2907.02, Ohio Revised Code. Petitioner was tried to a jury which found him guilty as charged. On November 16, 1981 petitioner was sentenced to a term of seven (7) to twenty-five (25) years imprisonment.

Petitioner directly appealed his conviction to the Court of Appeals for Muskingum County, Ohio alleging the following assignments of error:

1. The trial court abused its discretion in refusing to permit the defendant to call two witnesses.
2. The court erred when it placed conditions upon the defendant's right to return to the courtroom after the defendant indicated that he wished to be allowed to voluntarily absent himself from the trial.

On August 3, 1982 the Court of Appeals overruled petitioner's assignments of error and affirmed the judgment of the trial court.

Thereafter, petitioner sought review in the Supreme Court of Ohio. On February 2, 1983, that Court overruled petitioner's motion for leave to appeal and sua sponte dismissed the appeal for want of a substantial constitutional question.

Petitioner alleges that he is in the custody of respondent in violation of the Constitution of the United States in that:

1. The trial court abused its discretion in refusing to permit the defendant to call two witnesses.
2. The court erred when it placed conditions upon the defendant's right to return to the courtroom after the defendant indicated that he wished to be allowed to voluntarily absent himself from the trial.
3. The evidence was unlawfully removed and fabricated.

Petitioner's third ground for relief has never been presented to the Ohio courts. A state prisoner is required to exhaust all available state judicial remedies before he may seek redress by way of petition for federal habeas corpus. Picard v.

Connor, 404 U.S. 270, 275 (1971). If his constitutional claims have not been fairly presented by any procedure available in the state courts, his claims have not been exhausted. 28 U.S.C. §2254(b), (c).

Petitioner explains that the third claim was not presented in the Ohio courts because his attorney refused to do so. Respondent contends that petitioner still has available the remedy of post-conviction relief pursuant to §2953.21, Ohio Revised Code. Consequently, respondent asserts the petition must be dismissed in its entirety for failure to exhaust state judicial remedies as required by 28 U.S.C. §2254(b), (c).

Petitioner's factual allegations concerning his third ground for relief are as follows:

The primary evidence that linked the defendant to the crime were two fingerprints taken from the victim's glasses. The fingerprints were removed from the glasses, and the glasses was [sic] returned the [sic] victim the next day.

As evidenced by the trial record, it is petitioner's position that his fingerprints, which were allegedly taken from the victim's glasses, were not taken from those glasses at all. Rather, petitioner asserts that the fingerprints were removed from his personal objects, which he contends were illegally removed from his home by the sheriff's department.

Under Ohio law, constitutional issues cannot be considered in post-conviction proceedings under §2953.21 of the Revised Code where they have already been or could have been fully litigated, either during trial or on direct appeal. Keener

v. Ridenour, 594 F.2d 581, 586 (6th Cir. 1979); State v. Perry, 10 Ohio St. 2d 175, 180 (1967); State v. Roberts, 1 Ohio St. 3d 36, 39 (1982). Petitioner was aware of his evidentiary claim with respect to the fingerprints at the time of the trial. This is evidenced by the fact that he filed a motion to suppress that evidence, which was overruled by the trial court. Thus, although he had an opportunity to fully litigate the issue both at trial and on direct appeal, petitioner failed to pursue the matter. The claim is therefore not cognizable in a post-conviction proceeding under §2953.21 of the Revised Code. Id.

It is not disputed by respondent that petitioner is precluded from raising the claim in any other state court proceedings. Accordingly, the Court concludes that petitioner has exhausted all available state remedies with respect to his third ground for relief as required by 28 U.S.C. §2254(b), (c).

I

The facts of the case, as presented at trial, are as follows:

On the evening of November 14, 1980 Karen Merry was attending an accounting class at Ohio University in Zanesville. After the class was dismissed at 9:00 p.m., she remained in the building to discuss some questions with her professor. At approximately 9:30, she left the building and proceeded to her car, which was parked in an adjacent lot. As she sat in the car warming the motor up, a man approached from behind. He opened

the driver's door and directed Ms. Merry to move over to the passenger's side of the car.

The man, who was wearing a ski mask, drove the car to Adams Circle. There he pulled off the road into a small turn-off. He stopped the car some ten to twenty yards from the street and sat smoking a cigarette. When Ms. Merry attempted to leave the car, the man placed a knife at her throat and told her that he would kill her if she did not have sexual relations with him. As the man undressed Ms. Merry, he removed her glasses and threw them into the back seat of the car. The man then sexually assaulted Ms. Merry and raped her. He subsequently left the car, directing Ms. Merry how to drive away from the area so as to avoid a ditch. Within one-half hour of the assault, the rape was reported to the police.

Throughout their investigation, the police treated petitioner as a suspect. He lived within 800 yards of Adams Circle, the site of the assault. He was known by police to own a ski mask of the kind described by Ms. Merry. Further, his height, weight, and body build were similar to the description Ms. Merry gave of her assailant.

Petitioner's name was sent, along with lifts of the fingerprints obtained from Ms. Merry's glasses, to the FBI in Washington, D.C. There the fingerprints were positively identified as those of petitioner. He was subsequently arrested in Jacksonville, Florida.

At trial, the state's case consisted primarily of Ms. Merry's testimony, along with other physical evidence connecting

petitioner to the crime: the close proximity of his home to the scene of the rape, the fact that petitioner smoked the same brand of cigarette which was later found in Ms. Merry's car, and the identification of his fingerprints which were found on Ms. Merry's glasses.

Petitioner's alibi defense was that he was in Florida from the end of September, 1980 until his arrest there in January, 1981. Richard Drzewiecki testified that he met petitioner in Jacksonville, Florida during late October, 1980. He saw him at least 3 times a week through the date of the rape. He had no specific recollection of petitioner's whereabouts on November 14, 1980. On cross-examination, Mr. Drzewiecki admitted that he and petitioner were incarcerated together while petitioner was awaiting extradition from Florida to Ohio on the rape charge.

## II

Petitioner's first claim is that the trial court abused its discretion in refusing to permit him to call two witnesses at trial, depriving him of his right to fair trial and to fully develop his defense.

After providing full discovery, the state requested reciprocal discovery from the defense pursuant to Rule 16(c) of the Ohio Rules of Criminal Procedure. The trial court ordered

the defense to provide full discovery by entry filed October 30, 1981. At approximately 4:00 p.m. on the day prior to trial, petitioner provided the state with the name of Richard Drzewiecki, an alibi witness.

On the morning of trial, the state was advised of the names of two additional alibi witnesses, Karen Clapper and Lura Smith. Petitioner's counsel proffered that Lura Smith, petitioner's mother, and Karen Clapper, his sister, would have testified that during October and November, 1980 they each received collect telephone calls from petitioner in Florida. Petitioner also offered a telephone record or records supporting this proffered testimony.

➤ Petitioner's attorney informed the trial court that petitioner had withheld these names from him until the late hours of the day preceding trial. The trial court permitted Mr. Drzewiecki to testify, but precluded petitioner from calling Ms. Clapper or Ms. Smith. The state court of appeals held that this ruling was properly within the scope of the trial court's discretion. Respondent submits that the trial court's ruling with regard to the requirements of Rule 16 of the Ohio Rules of Criminal Procedure is exclusively within the province of the state judiciary.

➤ Petitioner contends that he should not have been held to the technical requirements of the discovery rules with regard to notifying the state of his alibi witnesses. He indicates that he was incarcerated in Columbus until the day preceding the trial, which was held in Ianesville. He asserts that, for this

reason, he had insufficient opportunity to raise the matter with counsel. However, petitioner's attorney state on the record at trial that he had discussed the case with his client on a number of occasions, and that he had repeatedly asked for the names of witnesses who could establish a defense. Petitioner refused to cooperate with him. Petitioner did not mention his mother and sister to defense counsel until the day before trial.

Petitioner further reasons that by providing the state with the name of Mr. Drzewiecki, he placed the state on notice that it would be required to respond to an alibi defense. Because Ms. Clapper and Ms. Smith would have also testified as to the alibi defense, in petitioner's view, the prosecutor would have not been prejudiced or surprised by the last-minute introduction of new defenses.

In a habeas proceeding, a United States District Court does not exercise direct review over state court decisions. Rather, the scope of federal habeas review is confined to errors which are of constitutional dimension. Bell v. Arn, 536 F.2d 123, 125 (6th Cir. 1976). Generally, state court rulings on the admission or exclusion of evidence do not raise constitutional issues. Burke v. Egeler, 512 F.2d 221, 223 (6th Cir. 1975), cert. denied, 423 U.S. 937 (1975); Reese v. Caldwell, 410 F.2d 1125, 1126 (6th Cir. 1969); Gammel v. Buchhoe, 358 F.2d 338, 340 (6th Cir. 1966), cert. denied, 385 U.S. 962 (1966). However, a trial court evidentiary ruling may render the trial so fundamentally unfair as to constitute a denial of federal rights. Logan v. Marshall, 680 F.2d 1121, 1123 (6th Cir. 1982); Gallihan v.

Rodriguez, 351 F.2d 1182, 1191-2 (10th Cir. 1977); Bell v. Arn, supra, 536 F.2d at 125.

✦ The right to present witnesses in one's behalf is a fundamental right made applicable to the states by the due process clause of the Fourteenth Amendment. Chambers v. Mississippi, 410 U.S. 294 (1973); Washington v. Texas, 368 U.S. 14 (1967). However, the right is not absolute; the state may properly condition the admissibility of evidence upon rules which are designed to further legitimate state interests.✦

The Supreme Court has recognized that states have a legitimate interest in preventing a criminal defendant from concocting a last-minute alibi. Wardius v. Oregon, 412 U.S. 470, 474-475 (1973); Williams v. Florida, 399 U.S. 78, 81 (1970).

✦ However, state procedural requirements must conform to the limits of the Constitution. The issue this Court must consider is whether petitioner's trial was rendered fundamentally unfair by the trial court's decision to exclude the testimony of his alibi witnesses as a sanction for failure to comply with the court's discovery order pursuant to Rule 16(c).

The question of whether the exclusion of relevant evidence, such as that provided by an alibi witness, as a sanction for non-compliance with discovery rules violates constitutional principles has been expressly left open by the Supreme Court. Wardius, supra, 412 U.S. at 83 n. 14; Williams, supra, 399 U.S. at 472 n. 4. The circuit courts have split on the issue, some holding that the Sixth Amendment forbids the exclusion of relevant evidence as a sanction to enforce discovery rules

against criminal defendants, United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981); see, United States v. Watson, 669 F.2d 1374, 1383 (11th Cir. 1982), while others hold that such sanctions do not violate the fundamentals of due process. United States v. Smith, 524 F.2d 1288 (D.C. Cir. 1975); Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966).

† In United States v. White, 583 F.2d 899 (6th Cir. 1978), the Sixth Circuit examined the issue of whether a trial court abused its discretion in excluding defense alibi testimony to sanction non-compliance with the alibi witness disclosure provisions of Rule 12.1, Fed. R. Crim. P. There, the defendant first offered the testimony of alibi witnesses after both the prosecution and the defense had rested their cases. While observing that the trial court has the discretion to rule on the admissibility of evidence, the Court noted that the interest of the defendant in having a fair trial must be carefully balanced against the interest of avoiding surprise and delays. The Court enumerated several factors to consider in striking this balance:

(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for non-disclosure, (3) the extent to which the harm caused by non-disclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case.

583 F.2d at 902, quoting from United States v. Myers, 590 F.2d 1036, 1043 (5th Cir. 1977). The Court of Appeals held that the trial court did not abuse its discretion under Rule 12.1 in excluding the defense's alibi witnesses. The constitutionality

of Rule 12.1 was not considered because the defendant did not contend that the compulsory notice provision denied him due process or a fair trial. 583 F.2d at 901, n. 3.

Although the factors enumerated in the White decision were employed to determine whether the trial court had abused its discretion in making an evidentiary ruling, they provide a useful framework for analysis of petitioner's constitutional claim. They are particularly relevant in that the underlying interests are identical in each instance: the fundamental right to a fair trial balanced against the interest of the state in avoiding the unfair surprise of eleventh-hour alibi defenses. Consideration of these factors leads us to conclude that the trial court's evidentiary ruling did not deprive petitioner of a fair trial.

The prosecution in this case was severely prejudiced by petitioner's failure to disclose the names of Ms. Clapper and Ms. Smith until the morning of trial. Had they been permitted to testify, the prosecution would have been deprived of any opportunity to interview the witnesses or investigate their representations. The prosecution would have been thereby prevented from developing any meaningful cross-examination.

¶ Perhaps more importantly, this is not a case in which the evidence was excluded solely as the result of the failure of petitioner's counsel to comply with the discovery procedures. See, Cox v. Cardwell, 464 F.2d 639, 644 (8th Cir. 1972). Counsel for petitioner informed the court that the names of these witnesses had been deliberately withheld by petitioner until the day before trial, in spite of repeated requests by counsel for the

"names of anybody who could help." Despite petitioner's assertions to the contrary, his attorney had visited him on numerous occasions both in Columbus and Zanesville, and petitioner had ample opportunity to discuss this matter with counsel.

In fact, counsel for petitioner made numerous motions to the court requesting that he be permitted to withdraw as counsel, for the specific reason that petitioner had refused to cooperate and assist in his own defense. The court admonished petitioner on several occasions regarding his lack of cooperation with counsel. Since petitioner deliberately thwarted his counsel's efforts to provide him with a fair defense, he cannot now complain that he has been denied a fair trial due to an evidentiary ruling which came as a direct result of his failure to cooperate.

Moreover, the trial court did not exclude all of the alibi evidence. Petitioner testified in his own defense, and Mr. Drzewiecki was also permitted to testify regarding petitioner's alibi. However, in light of the testimony of the state's witnesses and the fact that petitioner's fingerprints were found on the victim's glasses, it is apparent that the jury did not believe the alibi testimony. It is doubtful that the jury would have believed the alibi testimony of two additional witnesses who were both members of petitioner's family. See, White, supra, 383 F.2d at 902.

We agree with the Fifth Circuit that the exclusion in a criminal case of relevant, probative, and otherwise admissible

4 evidence solely for non-compliance with a discovery rule is an extreme sanction. United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981). However, we believe that there are overriding policy considerations supportive of the trial court's determination in this case. The discovery rules were designed specifically to prevent the occurrence of events such as are presented by this case. The interest of the state in avoiding the concoction of last minute alibis by criminal defendants was compromised in this case by a deliberate withholding of information on the part of petitioner. His two alibi witnesses were both family members, so he certainly knew of their identities and whereabouts. He had ample opportunity to notify counsel of his alibi defense and witnesses. The Criminal Rules were adopted to serve the purpose of ensuring a full and fair trial for all parties in a criminal action. A defendant who deliberately attempts to subvert the policies and provisions of those rules cannot be heard to complain that his trial was unfair when such an attempt has been obstructed.

For the reasons discussed above, the Court concludes that petitioner was not denied a fair trial when the trial court excluded the testimony of his two alibi witnesses as a sanction for his deliberate failure to comply with its discovery order.

### III

Petitioner's second claim for relief is that the trial court erred when it placed restrictions on his right to return to the courtroom after he requested that he be allowed to voluntari-

ly absent himself from the trial.

Petitioner became quite agitated after the trial court refused to permit him to call his two alibi witnesses. See discussion, infra. He engaged in several outbursts with the court, prosecutor and spectators while on the witness stand. Subsequent to his direct testimony and during his cross-examination, petitioner requested that he be permitted to remove himself from the courtroom.

Out of the presence of the jury, the following dialogue took place between the court and petitioner:

THE COURT: All right. Over the objection of the prosecuting attorney and over the recommendation contrary of that the Court is going to grant that request due to the fact that you are the defendant in this case and if you wish to remove yourself from the courtroom, that is your request and that is in the interest of justice. If you wish the Court will proceed with the trial in your absence and so the defendant may be removed at this time. I might point out before you leave for the record that if you should desire to return to the courtroom at any time with the understanding that you would cooperate with your counsel and refrain from any further outbursts, then the Court would discuss that with you at that time and I would probably bring you back. Do you understand what I am saying?

WHEREUPON, THE WITNESS NODDED HEAD INDICATING YES.  
(Transcript at 246).

Petitioner contends that the Court should not have placed these conditions on his return in light of the fact that no finding was made that petitioner failed to cooperate with his attorney or that he was engaging in outbursts.

Respondent argues that under Ohio law the conduct of the trial is within the discretion of the trial judge and that such a question is not cognizable in a federal habeas corpus action.

✶ The right of a criminal defendant to be present during trial proceedings is essential to the fundamentals of due process:

In Fillippon v. Albion Vein Slate, 250 U.S. 76 (1919), the Court observed 'that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.'

✶ Rogers v. United States, 422 U.S. 35, 38 (1975). The Sixth Amendment right of confrontation is so fundamental as to be part of the 'due process of law' guaranteed to defendants in state criminal proceedings by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965); Faretta v. California, 422 U.S. 806 (1975).

✶ However, the right to be present during trial proceedings is not absolute, and may be waived by the defendant. Illinois v. Allen, 397 U.S. 337, 343 (1970); Snyder v. Mass. 291 U.S. 97, 99 (1934). If the defendant knew or should have known of his right to be present, his voluntary absence from the proceedings presents no constitutional violation. Taylor v. United States, 414 U.S. 17, 19-20 (1973); Diaz v. United States, 442, 445 (1912).

In holding that a defendant's conduct may justify his forced removal from the courtroom, the Supreme Court noted that there was nothing unconstitutional in the procedure of allowing the defendant to return to the courtroom "as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Illinois v. Allen, 397 U.S. 337, 343 (1970), reh. denied, 398 U.S. 915 (1970). The same is true for cases in which the defendant has voluntarily removed himself from the courtroom.

The trial court has the right and responsibility to control the conduct of all persons who appear in the courtroom. The trial judge certainly requires nothing unduly burdensome when he asks only that the defendant refrain from disrupting the proceedings and make some effort to cooperate in his own defense in order to be allowed to return to the courtroom. Accordingly, the Court finds that petitioner's second claim is without merit.

#### IV

Petitioner's third ground for relief is that evidence connecting him to the crime was "unlawfully removed and fabricated." Petitioner contends that the fingerprints linking him to the crime were not found on the victim's eyeglasses, but were obtained from his personal property taken during searches of his home. At trial, petitioner testified to his belief that his fingerprints were obtained from objects which were removed from his home during illegal searches conducted by the police.

The United States Supreme Court held in Stone v. Powell, 428 U.S. 465, 494 (1976) that:

where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search and seizure was introduced at trial.

The United States Court of Appeals for the Sixth Circuit has determined that the application of Stone v. Powell, supra, requires a two part analysis:

Initially, the district court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim. ... Second, the Court must determine whether presentation of the claim was in fact frustrated because of the failure of that mechanism.

Riley v. Gray, 674 F.2d 522, 526 (6th Cir. 1981).

The Court of Appeals further held in Riley v. Gray, supra, 674 F.2d at 51e that the Ohio procedural mechanism for considering Fourth Amendment claims provides an adequate opportunity for review of those claims. Therefore, our inquiry turns to whether presentation of petitioner's claim was frustrated by a failure of that mechanism.

The Court has reviewed the suppression hearing and concludes that petitioner was permitted to fully and fairly present his Fourth Amendment claims. Thus, petitioner is not entitled to relief in federal habeas corpus on this basis.

6-12-20  
With regard to the allegation that the evidence in the case was fabricated, petitioner has failed to point to any evidence which would substantiate his claim. The Court has carefully reviewed the hearing on the motion to suppress and the fingerprint testimony adduced at trial. Petitioner's counsel cross-examined each witness at length regarding the origin of the fingerprints. The jury apparently found that there was insufficient evidence to establish that the fingerprints found on the victim's glasses were not those of petitioner. Overall, there is nothing in the trial record suggestive of improper conduct on the part of the police or prosecutor. A claim for relief in a habeas corpus proceeding must rest on something more substantial than conclusory allegations unsupported by the record.

The Court holds that petitioner's third claim for relief does not raise the possibility of constitutional error and is therefore not cognizable in habeas corpus. Accordingly, petitioner's third claim for relief is DENIED.

WHEREUPON, the Court HOLDS that the petition is without merit; and, therefore, it is DENIED.

This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for respondent.

  
United States District Judge

# **OPPOSITION BRIEF**

ORIGINAL

84-5548  
CASE NO. ~~XXXXXX~~

Supreme Court, U.S.  
FILED

JAN 22 1985

ALEXANDER L. STEVENS  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LARRY RAYMOND SMITH,

Petitioner,

v

ARNOLD R. JAGO, SUPERINTENDENT,  
London Correctional Institution,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

9714

84-5548

CASE NO. ~~84-5548~~

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LARRY RAYMOND SMITH,  
Petitioner,

v

ARNOLD R. JAGO, SUPERINTENDENT,  
London Correctional Institution,  
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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I.

WHETHER A STATE TRIAL COURT RULING EXCLUDING CERTAIN ALIBI EVIDENCE AS A SANCTION FOR DEFENDANT'S FAILURE TO COMPLY WITH THE TRIAL COURT'S DISCOVERY ORDER ENCOMPASSES A MATTER OF STATE LAW WHICH IS PRECLUDED FROM REVIEW IN A FEDERAL HABEAS CORPUS PROCEEDING AND FAILS TO OFFEND THE CONSTITUTIONAL PRINCIPLES OF FUNDAMENTAL DUE PROCESS AND COMPULSORY PROCESS.

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PARTIES

Pursuant to Rule 34.1 of the Rules of the Supreme Court,  
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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1984

LARRY RAYMOND SMITH,

Petitioner,

v

ARNOLD R. JAGO, SUPERINTENDENT,  
London Correctional Institution,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit, of the United States District Court for the Southern District of Ohio, Eastern Division and of the Ohio Court of Appeals for the Fifth Judicial District are all unreported. These opinions of the courts below are reproduced in the appendix attached to this brief in opposition.

JURISDICTION

The decision of the United States District Court for the Southern District of Ohio, Eastern Division was issued on June 28, 1983. The decision of the United States Court of Appeals for the Sixth Circuit was issued on July 19, 1984. Jurisdiction is pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

...nor shall any State deprive any person of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor....

STATEMENT OF THE CASE

Petitioner was indicted by the Muskingum County Grand Jury, January Term, 1981, for rape in violation of Ohio Revised Code Section 2907.02. Petitioner had the assistance of counsel, was tried before a jury and found guilty as charged. Petitioner was sentenced to a term of from seven (7) to twenty-five (25) years imprisonment.

At trial, the following evidence was presented. At approximately 9:30 p.m. on November 14, 1980, Karen Jean Merry was sitting in her car in a parking lot of the Zanesville campus of Ohio University. While Ms. Merry waited for her automobile to warm up, a man wearing a ski mask opened the door and forced her to move across the front seat to the passenger side. Ms. Merry indicated that this man had the same build and height as petitioner. The man then drove Ms. Merry's automobile to a secluded spot on a rural road. The drive took approximately two to five minutes. Adams Circle, the street where petitioner and his family lived, intersects Adams Lane, the rural road. The spot where the assailant parked the automobile was approximately 800 feet from petitioner's apartment. (Tr. 35-39, 45, 90).

After bringing the automobile to a stop the assailant lit a cigarette, began to smoke it, and then extinguished it. According to Ms. Merry, the assailant then turned toward her, placed a knife to her throat, and told her that he would kill her if she did not have intercourse with him. He partially undressed Ms. Merry and then forced her to submit to oral and vaginal sex. The assailant then exited the automobile and told Ms. Merry to drive away. (Tr. 42-43).

The primary evidence that linked petitioner to the crime was two fingerprints taken from Ms. Merry's glasses. Ms. Merry testified that the assailant had removed the glasses from her face and placed them in the back seat of the automobile. Ms. Merry also stated that the glasses had not been removed from the back seat until the police searched the automobile for evidence. The fingerprints were identified at the trial as those of petitioner by Louis G. Hupp, a special agent for the F.B.I. Mr. Hupp compared the fingerprints on the glasses to petitioner's fingerprints on an arrest card. (Tr. 47).

Ms. Merry was examined at Good Samaritan Medical Center in Zanesville. The examination revealed the presence of sperm in her vagina. Her physical condition, mental state, and swollen vagina were consistent with forced intercourse according to the doctor who conducted the hospital examination. (Tr. 49-50, 79).

The prosecution also introduced into evidence a "Kool" cigarette which was discovered in the victim's car a week to ten days after the rape. The prosecution produced records from Muskingum County Jail showing that Smith had smoked that brand of cigarette prior to the time the prosecution informed defense counsel that they intended to introduce a "Kool" cigarette as evidence. (Tr. 42, 231).

Detective Sergeant Steve Walker, one of the investigating officers, indicated that he had attempted to question Smith on numerous occasions and had not been able to discover his whereabouts. Detective Walker also testified that he had searched the petitioner's apartment and automobile several times after obtaining consent from petitioner's wife and had removed items of

personal property from the petitioner's apartment with her consent. Detective Walker also testified that he went to the Smith apartment almost daily between November 15, 1980, and the early part of January, 1981, and was unable to contact petitioner, even though Smith's automobile was always at the residence through December 26, 1980 (Tr. 91, 104).

On January 28, 1981, petitioner was arrested in Jacksonville, Florida. Petitioner was held in Florida until he was extradited by the State of Ohio in September of 1981. After arraignment in Muskingum County, petitioner was detained at the Columbus Correctional Facility. Petitioner was returned to Muskingum County on November 10, 1981, for his trial which began on November 12, 1981.

Two witnesses testified for the defense: petitioner and one Richard Drzewiecki. Drzewiecki stated that he had been contacted by petitioner concerning a motorcycle that Drzewiecki was selling. Drzewiecki stated that he sold the motorcycle on or about November 18, 1980, and that he had held conversations with petitioner for a period of one to two weeks prior to that time. (Tr. 200). Drzewiecki had no specific recollection of petitioner's whereabouts on November 14, 1980. On cross-examination, Drzewiecki admitted that he and petitioner were incarcerated together while petitioner was awaiting extradition from Florida to Ohio on the rape charge.

Petitioner testified, denying guilt in connection with this matter. Petitioner stated that he arrived in Florida in October of 1980 and stayed there until he was transported back to Ohio following extradition. Being quite upset by the judge's refusal

to permit him to call two alibi witnesses, petitioner engaged in several outbursts with the court, prosecutor and spectators while on the witness stand. Petitioner was claiming that this decision deprived him of a fair trial. In fact, petitioner became so upset that subsequent to his direct testimony and while he was being cross-examined, he requested that he be permitted to remove himself from the courtroom. (Tr. 222, 246). Prior to his departure, the following dialogue took place between the court and the petitioner:

THE COURT: All right. Over the objection of the prosecuting attorney and over the recommendation contrary of that the Court is going to grant that request due to the fact that you are the defendant in this case and if you wish to remove yourself from the courtroom, that is your request and that is in the interest of justice. If you wish the Court will proceed with the trial in your absence and so the defendant may be removed at this time. I might point out before you leave for the record that if you should desire to return to the courtroom at any time with the understanding that you would cooperate with your counsel and refrain from any further outbursts, then the Court would discuss that with you at that time and I would probably bring you back. Do you understand what I am saying?

WHEREUPON, THE WITNESS NODDED HEAD INDICATING YES.  
(Tr. 246).

Thereafter, petitioner spent the remainder of the trial in the Muskingum County Jail until he returned for the reading of the verdict. (Tr. 222, 246).

Petitioner appealed the judgment of conviction to the Ohio Court of Appeals for the Fifth Appellate District. On August 3, 1982, the appellate court issued its opinion unanimously affirming the judgment of conviction. (A26 - A32). Leave to appeal to the Supreme Court of Ohio was subsequently denied and dismissed on

February 2, 1983 for want of a substantial constitutional question.  
(A-24).

On March 16, 1983, petitioner filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. Section 2254 with the United States District Court, Southern District of Ohio, Eastern Division. Three grounds for relief were advanced.<sup>1</sup> Thereafter, the district judge denied the writ by opinion and order dated June 23, 1983. (A5 - A23). The decision of the district court was upheld by the United States Court of Appeals for the Sixth Circuit in an unreported decision issued on July 19, 1984. (A1-A4).

Petitioner is presently incarcerated at the London Correctional Institution, London, Ohio under the supervision of Respondent, Arnold R. Jago.

<sup>1</sup>

1. The trial court abused its discretion in refusing to permit Smith to call two (2) witnesses.
2. The trial court erred when it placed conditions upon Smith's right to return to the courtroom after Smith indicated that he wished to be allowed to voluntarily absent himself from the trial.
3. The evidence was unlawfully removed and fabricated.

#### SUMMARY OF ARGUMENT

##### I.

Petitioner has not been deprived of any constitutional rights as a result of the trial court imposing sanctions for his failure to comply with its discovery order. Initially, respondent argues that state court rulings on the admissibility of evidence do not raise constitutional issues and are not reviewable in a federal habeas corpus proceeding. Further, the respondent also argues that the instant case presents facts whereby the petitioner had ample time to notify his counsel and the prosecution of his intention to call his mother and sister as witnesses and present phone bills in support of his alibi defense. Instead, petitioner waited until the day of trial to notify the court, the prosecutor and his own counsel his intentions. Further, it should be noted that petitioner was not precluded from asserting this defense as he testified and was permitted to have another witness testify as to his alibi. Under the circumstances of this case, the Court's pronouncements as to the interests and concerns served by broad and reciprocal discovery would be frustrated by allowing individuals to assert eleventh hour alibis without limitations. The unfair surprise and undue burden occasioned by such activity warrants the imposition of the sanction of excluding evidence. The petitioner's deliberate failure to comply with the court's discovery order justified the imposition of such a sanction and did not offend any constitutional principles in this case.

##### II.

The trial court has both the right and the duty to maintain control over the conduct of those who appear in the courtroom. To require an obstreperous defendant to refrain from outbursts and

cooperate in his own defense as a condition of returning to the courtroom after a voluntary departure did not offend petitioner's due process rights.

## ARGUMENT

### I.

A STATE TRIAL COURT RULING EXCLUDING CERTAIN ALIBI EVIDENCE AS A SANCTION FOR DEFENDANT'S FAILURE TO COMPLY WITH THE TRIAL COURT'S DISCOVERY ORDER ENCOMPASSES A MATTER OF STATE LAW WHICH IS PRECLUDED FROM REVIEW IN A FEDERAL HABEAS CORPUS PROCEEDING AND FAILS TO OFFEND THE CONSTITUTIONAL PRINCIPLES OF FUNDAMENTAL DUE PROCESS AND COMPULSORY PROCESS.

The petitioner's first claim is that he was denied a fair trial when the trial court refused to permit him to call two witnesses and present phone bills in support of his alibi defense. This sanction was imposed as a result of petitioner's failure to comply with the court's discovery order.

In its opinion, the Southern District summed up the salient facts relevant to this issue:

After providing full discovery, the state requested reciprocal discovery from the defense pursuant to Rule 16(c) of the Ohio Rules of Criminal Procedure.<sup>2</sup>

<sup>2</sup> Rule 16 of the Ohio Rules of Criminal Procedure in pertinent part states:

(A) DEMAND FOR DISCOVERY. Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) DISCLOSURE OF EVIDENCE BY THE PROSECUTING ATTORNEY.

(1) Information Subject to Disclosure.

(e) Witness Names and Addresses; Record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney.

(C) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) Information Subject to Disclosure.

(c) Witness Names and Addresses. If on request or motion the defendant obtains discovery under subsection (B) (1)(e), the court shall, upon motion of the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial.

(footnote continued)

The trial court ordered the defense to provide full discovery by entry filed October 30, 1981. At approximately 4:00 p.m. on the day prior to trial, petitioner provided the state with the name of Richard Drzewiecki, an alibi witness.

On the morning of trial, the state was advised of the names of two additional alibi witnesses, Karen Clapper and Lura Smith. Petitioner's counsel proffered that Lura Smith, petitioner's mother, and Karen Clapper, his sister, would have testified that during October and November, 1980 they each received collect telephone calls from petitioner in Florida. Petitioner also offered a telephone record or records supporting this proffered testimony.

Petitioner's attorney informed the trial court that petitioner had withheld these names from him until the late hours of the day preceding trial. The trial court permitted Mr. Drzewiecki to testify but precluded petitioner from calling Ms. Clapper or Ms. Smith. The state court of appeals held that this ruling was properly within the scope of the trial court's discretion. Respondent submits that the trial court's ruling with regard to the requirements of Rule 16 of the Ohio Rules of Criminal Procedure is exclusively within the province of the state judiciary.

Petitioner contends that he should not have been held to the technical requirements of the discovery rules with regard to notifying the state of

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Footnote 2 continued...

(D) CONTINUING DUTY TO DISCLOSE. If subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) REGULATION OF DISCOVERY.

(3) Failure to Comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(footnote continued)

his alibi witnesses. He indicates that he was incarcerated in Columbus until the day preceding the trial, which was held in Zanesville. He asserts that, for this reason, he had insufficient opportunity to raise the matter with counsel. However, petitioner's attorney stated on the record at trial that he had discussed the case with his client on a number of occasions, and that he had repeatedly asked for the names of witnesses who could establish a defense. Petitioner refused to cooperate with him. Petitioner did not mention his mother and sister to defense counsel until the day before trial.

Petitioner further reasons that by providing the state with the name of Mr. Drzewiecki, he placed the state on notice that it would be required to respond to an alibi defense. Because Ms. Clapper and Ms. Smith would have also testified as to the alibi defense, in petitioner's view, the prosecutor would have not been prejudiced or surprised by the last-minute introduction of new defenses.

Smith v Jago, No. C-2-83-481, Slip. Op. at 6-8 (S.D. Ohio, June 28, 1983).

The allegations contained in petitioner's brief, if true, give rise to possible violations of both the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment.

Respondent submits that petitioner's claims are not reviewable in the federal courts and that no constitutional principles have been violated.

Clearly, the imposition of a sanction for petitioner's failure to comply with a state procedural rule is a matter of state law. Matters of state law fall within the purview of the state

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Footnote 2 continued...

(F) TIME OF MOTIONS. A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

courts and may not be contested in the federal courts. Bell v. Arn, 536 F. 2d 123 (6th Cir. 1976), Reese v. Cardwell, 410 F. 2d 1125 (6th Cir. 1969). As noted in the courts below, the instant case involves a state court ruling on the admission or exclusion of evidence which does not generally raise issues of constitutional proportion. Burks v. Egeler, 512 F. 2d 221 (6th Cir.), cert. denied 423 U.S. 937 (1975); Reese v. Cardwell, 410 F. 2d 1125 (6th Cir. 1969); Gammel v. Buchkoe, 358 F. 2d 338 (6th Cir.) cert. denied 385 U.S. 962 (1966). Even assuming arguendo, that the state court had made a mistake, it is nevertheless recognized that a "mere error of state law" does not pose a constitutional question. Engle v. Isaac, 456 U.S. 107, 121 n. 21 (1982). Only if the trial court's evidentiary ruling rendered the trial so fundamentally unfair as to constitute a denial of federally secured rights would review be warranted in this matter. Logan v. Marshall, 680 F. 2d 1121 (6th Cir. 1982); Gillihan v. Rodriguez, 551 F. 2d 1182 (10th Cir.); Coombs v. Tennessee, 530 F. 2d 695 (6th Cir. 1976). Respondent submits that the trial court's exclusion of some of petitioner's alibi evidence did not render his trial so fundamentally unfair as to rise to the level of a deprivation of federal constitutional rights requiring federal review.

Respondent will now discuss the substantive merits raised in the above-noted argument. One of the rights allegedly violated by the trial court's exclusion of alibi witnesses is the right to present witnesses in one's behalf, which is a fundamental right made applicable to the states by the Due Process Clause of the

Fourteenth Amendment. Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967). Further, there is a potential violation of the compulsory service clause of the Sixth Amendment. United States v. Davis, 639 F. 2d 239 (5th Cir. 1981); United States v. Watson, 669 F. 2d 1374 (11th Cir. 1982). Respondent contends that these rights are not absolute and that the state may properly condition the admissibility of evidence upon discovery rules which are designed to further legitimate state interests.

Although never directly ruling on the validity of imposing sanctions for the failure to comply with discovery orders or rules, this Court has previously reviewed cases in which sanctions were imposed for failure to comply with discovery rules or orders. Warduis v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970). In the Williams case, the Court considered the constitutional validity of a discovery tool called the "notice-of-alibi rule." The question posed was whether this rule violated the mandates of the Fifth and Fourteenth Amendments. The rule provided for liberal and reciprocal discovery by requiring advance notice of the identity and location of alibi witnesses as well as advance notice of like information pertaining to witnesses to be called in rebuttal to the alibi witnesses. In its decision, the Court approved of this discovery tool stating, "Given the ease, with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh hour defense is both obvious and legitimate." Id. at 81. In a discussion of due process, the Court found ample room for a discovery system "which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate

certain facts crucial to the determination of guilt or innocence." Id. at 82.

In the case of Wardius v Oregon, 412 U.S. 470 (1973) the Court was again confronted with evaluating the constitutional validity of a discovery rule which provided for the ferreting out of alibi witnesses in advance of trial. The defendant in Wardius failed to comply with a discovery rule pertaining to alibi testimony and as a sanction was prohibited from introducing any evidence in support of his alibi defense. (Emphasis added). In its analysis the Court made several pronouncements about the development of criminal discovery procedures. Most importantly, the Court found the rule in question facially invalid because it was lacking in reciprocity between the State and the accused. Id. at 478. The Court held that: "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." Id. at 472. In its discussion the Court also noted that the growth of such discovery devices as the notice-of-alibi rules was "salutary" in that it enhances fairness in the adversary system. The Court reiterated its position taken in the Williams case that the Due Process Clause does not preclude states from the instituting of systems designed to produce broad discovery to both sides in an effort to achieve the goal of fairness. Id. at 474. The Court emphasized that what the Due Process Clause does speak to in the criminal discovery area is the balance of forces between accuser and the accused. Said balance is achieved through reciprocity:

"in the absence of a strong showing of state interests to the contrary, discovery must be a two way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. Id. at 476.

The issue of the imposition of sanctions for failure to comply with discovery rules or orders has also been discussed by several circuit courts of appeals. As noted in the Southern District's Opinion, the circuit courts have split on this issue:

"some holding that the Sixth Amendment forbids the exclusion of relevant evidence as a sanction to enforce discovery rules against criminal defendants, United States v Davis, 639 F. 2d 239, 243 (5th Cir. 1981); see United States v Watson, 669 F. 2d 1374, 1383 (11th Cir. 1982), while others hold that such sanctions do not violate the fundamentals of due process United States v Smith, 524 F. 2d 1288 (D.C. Cir. 1975); Rider v Crouse, 357 F. 2d 317 (10th Cir. 1966)."

(Appendix at A-10).

The Sixth Circuit has examined the issue of whether a trial court abused its discretion in excluding defense alibi testimony as a sanction for failure to comply with alibi witness disclosure requirements of Rule 12.1 of the Federal Rules of Criminal Procedure. United States v White, 583 F. 2d 899 (6th Cir. 1978). It should be noted that the constitutionality of the imposition of the sanction therein pursuant to Rule 12.1 of the Federal Rules of Criminal Procedure, was not considered because the defendant did not raise the issue. Id. at 903, n. 3. However, the factors utilized by the Sixth Circuit in the White case are helpful in analyzing the instant case because an underlying interest is common to both cases, i.e., the fundamental right to a fair trial balanced against the interest of the State in avoiding the unfair surprise of eleventh hour defenses. The factors to be considered are as follows:

(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for non-disclosure, (3) the extent to which the harm caused by non-disclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case.

Id. at 902 (quoting United States v Myers, 550 F. 2d 1036, 1043 (5th Cir. 1977)).

In the instant case, the trial court invoked a sanction of excluding some of petitioner's alibi evidence due to petitioner's failure to comply with its order pursuant to Rule 16 of the Ohio Rules of Criminal Procedure. A review of Rule 16 of the Ohio Rules of Criminal Procedure reveals that it meets the concerns of this Court in the Williams and Wardius cases by providing for broad and reciprocal discovery in an obvious effort to attain the goal of fairness in criminal proceedings.

The instant case also confronts the Court with a situation where the petitioner has presented his alibi defense at the eleventh hour. As noted previously, this Court has recognized the States interest in protecting itself from the unfair surprise of such last minute defenses. Further, in apoloving the factors utilized in the White case, the district court below in its opinion most aptly summed up the situation at hand:

The prosecution in this case was severely prejudiced by petitioner's failure to disclose the names of Ms. Clapper and Ms. Smith until the morning of trial. Had they been permitted to testify, the prosecution would have been deprived of any opportunity to interview the witnesses or investigate their representations. The prosecution would have been thereby prevented from developing any meaningful cross-examination.

Perhaps more importantly, this is not a case in which the evidence was excluded solely as the result of the failure of petitioner's counsel to comply with the discovery procedures. See, Cox v Cardwell, 464 F. 2d 639, 644 (6th Cir. 1972).

Counsel for petitioner informed the court that the names of these witnesses had been deliberately withheld by petitioner until the day before trial, in spite of repeated requests by counsel for the "names of anybody who could help." Despite petitioner's assertions to the contrary, his attorney had visited him on numerous occasions both in Columbus and Zanesville, and petitioner had ample opportunity to discuss this matter with counsel.

In fact, counsel for petitioner made numerous motions to the court requesting that he be permitted to withdraw as counsel, for the specific reason that petitioner had refused to cooperate and assist in his own defense. The court admonished petitioner on several occasions regarding his lack of cooperation with counsel. Since petitioner deliberately thwarted his counsel's efforts to provide him with a fair defense, he cannot now complain that he has been denied a fair trial due to an evidentiary ruling which came as a direct result of his failure to cooperate.

Moreover, the trial court did not exclude all of the alibi evidence. Petitioner testified in his own defense, and Mr. Drzewiecki was also permitted to testify regarding petitioner's alibi. However, in light of the testimony of the state's witnesses and the fact that petitioner's fingerprints were found on the victim's glasses, it is apparent that the jury did not believe the alibi testimony. It is doubtful that the jury would have believed the alibi testimony of two additional witnesses who were both members of petitioner's family. See, White, supra, 583 F. 2d at 902.

(Appendix at A-11 - A-13).

Based upon the foregoing discussion, it is evident that in the instant case there are overriding policy considerations supportive of the trial court's imposition of the sanction of excluding alibi evidence. To quote the district court below:

The discovery rules were designed specifically to prevent the occurrence of events such as are presented by this case. The interest of the state in avoiding the concoction of last minute alibis by criminal defendants was compromised in this case by a deliberate withholding of information on the part of petitioner. His two alibi witnesses were both family members, so he certainly knew of their identities and whereabouts. He had ample opportunity to notify counsel of his alibi defense and witnesses. The Criminal Rules were adopted

to serve the purpose of ensuring a full and fair trial for all parties in a criminal action. A defendant who deliberately attempts to subvert the policies and provisions of those rules cannot be heard to complain that his trial was unfair when such an attempt has been obstructed.

(Appendix at A-13).

A rule unenforced by a sanction renders it ineffective. If, in such a case as this, a sanction pursuant to a discovery rule cannot be invoked, then all the salutary purposes of the rule become a nullity. The State will be unfairly exposed to the burdens of the eleventh hour alibi from which there will be no meaningful protection.

Respondent submits that there has been no violation of constitutional principles with regard to this issue. This fact, coupled with the petitioner's actions, strongly militates against the Court granting the petition for writ of certiorari on this issue.

## II.

WHEN A CRIMINAL DEFENDANT ENGAGES IN DISRUPTIVE OUTBURSTS AT TRIAL AND VOLUNTARILY REMOVES HIMSELF FROM THE COURTROOM, THE PLACING OF CONDITIONS UPON THE DEFENDANT'S RETURN TO THE TRIAL PROCEEDINGS DOES NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

In his second claim, the petitioner states that his due process rights were violated when the trial court placed conditions upon his return to the trial proceedings before he voluntarily removed himself from the courtroom.

As noted previously, subsequent to the trial court's ruling disallowing alibi evidence as a sanction, the petitioner became quite agitated. He engaged in several outbursts with the court, prosecutor, and spectators while on the witness stand. After testifying on his own behalf and during his cross-examination, petitioner asked to be permitted to remove himself from the courtroom. Out of the presence of the jury, the court granted petitioner's request over the objection of the prosecuting attorney. The court further stated that petitioner would probably be allowed to return so long as he cooperated with his counsel and refrained from any further outbursts.

A fundamental right of due process includes the criminal defendant's right to be present during trial proceedings. Fillippon v Albion Vein Slate, 250 U.S. 76 (1919); Rogers v United States, 422 U.S. 35 (1975). Further, this Court has also deemed that the Sixth Amendment right of confrontation is so fundamental as to be part of the "due process of law" guaranteed by the Fourteenth Amendment to defendants in state criminal proceedings. Faretta v California, 422 U.S. 806 (1975); Pointer v Texas, 380 U.S. 400 (1965).

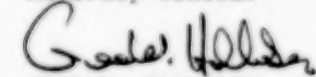
However, as is the case with a number of other fundamental rights, the right to be present and the right of confrontation are not absolute. Initially, such fundamental rights may be waived by the accused. Illinois v Allen, 397 U.S. 337, 343 (1970) reh. denied, 398 U.S. 915 (1970); Snyder v Mass, 291 U.S. 97, 99 (1934). Further, if the defendant knew or should have known of his right to be present, his voluntary absence from the proceedings does not violate any constitutional right. Taylor v United States, 414 U.S. 17, 19-20 (1973); Diaz v United States, 223 U.S. 442, 445 (1912). Just as the accused's obstreperous behavior may justify his removal, there is nothing unconstitutional in conditioning his return on the requirement that he be willing, "to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Illinois v Allen, 397 U.S. at 343. If this is true for one who has been removed then the same should apply to one who has voluntarily absented himself from the trial proceedings. The trial court has both the right and the duty to maintain control over the conduct of those who appear in the courtroom. To require an obstreperous defendant to refrain from outbursts and cooperate in his own defense as a condition of return after a voluntary departure, can hardly be said to have offended any constitutional principles. Petitioner's claim that his Due Process rights were violated under the above noted circumstances simply has no merit and the requested petition for a writ of certiorari should not be granted.

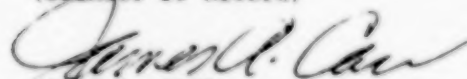
#### CONCLUSION

WHEREFORE, based upon the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney General

  
GENE W. HOLLIKER  
(Counsel of Record)

  
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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petitioner has been forwarded to Larry Raymond Smith, #165-730 and #148-154 through the office of Arnold R. Jago, Supt., London Correctional Institution, P.O. Box 69, London, Ohio 43140 via the U.S. Mail this 16th day of January, 1985.

JAMES A. CARR  
Assistant Attorney General

23

**No. 83-3524**

**FILED**

JUL 16 1934

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

JOHN P. HEHMAN, Clerk

LARRY RAYMOND SMITH,  
Petitioner-Appellant.

 Springer

ARNOLD R. JAGO, SUPT.,  
Respondent-Appellee.

## ORDER

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**  
Sixth Circuit Rule 24 limits access to specific documents. Please see  
Rule 24 before filing in a proceeding in a court in the Sixth Circuit. If  
filing, a copy must be served on other parties and the Court.  
This notice is to be prominently displayed if this document is reproduced.

BEFORE: ENGEL and WELLFORD, Circuit Judges; and NORTON,  
District Judge\*

This Ohio State prisoner appeals from a district court judgment dismissing his habeas corpus petition filed under 28 U.S.C. §2254. Petitioner attacked his 1981 jury conviction for rape for which he was sentenced to serve seven to twenty-five years. Petitioner alleged the following three grounds in his petition: 1) the trial court improperly refused to allow him to call two alibi witnesses; 2) the trial court improperly placed conditions on his right to return to the courtroom after he voluntarily absented himself from the courtroom; and, 3) proofs of his fingerprints were illegally fabricated and admitted into evidence. The district court dismissed the petition as to the first two grounds on the merits and declined review of the third ground.

On appeal, the petitioner argues that admission of the testimony from his alibi witnesses would not have placed any additional burden on the prosecutor as the court was already allowing the admission of testimony from another alibi witness which also showed that petitioner was in Florida and not in Ohio at the time of the rape. Secondly, petitioner argues that the trial court should not have placed conditions on his return to the courtroom because he left the courtroom voluntarily and not because he had

\* The Honorable Odell Horton, U.S. District Judge for the Western District of Tennessee, sitting by designation.

exhibited any disruptive behavior. Petitioner does not raise his third issue on appeal, which he had raised in the district court.

Upon review, this court concludes that the district court properly dismissed petitioner's habeas petition for the reasons given by it. The trial court clearly did not render petitioner's trial fundamentally unfair by refusing to permit the petitioner to call his mother and sister as two additional alibi witnesses (neither was proffered to be able to testify as to his whereabouts on the day or night of the rape). Cf. Logan v. Marshall, 680 F.2d 1121, 1123 (6th Cir. 1982); Moore v. Newell, 548 F.2d 671, 672 (6th Cir.), cert. denied, 431 U.S. 971 (1977). Application of the factors which this court enumerated in its discussion on an almost identical issue raised in United States v. White, 583 F.2d 899, 902 (6th Cir. 1978), shows no abuse of discretion nor a denial of fundamental fairness in the trial court's ruling. The disclosure of the two additional names on the day of trial would not have provided the state with sufficient time to interview the witnesses or to investigate their representations. Furthermore, petitioner's trial counsel informed the court that the names had been deliberately withheld by petitioner until late in the day before the trial. This occurred despite repeated requests by counsel for names of anybody who could help his cause. (See App. at 165). Notwithstanding the exclusion of the testimony, the alibi defense was placed into the record for the jury to consider by another witness who appeared as being more objective than petitioner's mother and

sister. Finally, the evidence of guilt was substantial. Petitioner's home was close to the scene of the crime. Petitioner smoked the same brand of the cigarette found in the victim's car, and, most damaging, petitioner's fingerprints were found on the victim's eyeglasses, which were removed from the victim during the course of the rape.

Regarding petitioner's second issue, it is observed, as the district court so noted, that the right to be present during trial proceedings is not absolute and may be waived by the defendant. Illinois v. Allen, 397 U.S. 337, 343, reh. denied, 398 U.S. 915 (1970); Snyder v. Massachusetts, 291 U.S. 97, 98 (1934). And, as the Supreme Court so observed in Illinois v. Allen, *supra*, 397 U.S. at 343, there is nothing unconstitutional in the procedure of allowing the defendant to return to the courtroom "as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Clearly, it is a natural and reasonable extension of this principle to apply it in a case where the defendant voluntarily absents himself from the courtroom following outbursts during the trial, thereby obviating the need to establish obstreperous behavior. The conditions placed on petitioner's return in this case were not unreasonable, arbitrary or capricious. The decisions rendered in Evans v. United States, 284 F.2d 393 (6th Cir. 1960) and in Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963),

relied upon by petitioner, are clearly distinguishable on their facts; and the decision rendered in Pearson v. United States, 325 F.2d 625 (D.C. Cir. 1963), rather than supporting petitioner's arguments, supports the trial court's decision to grant petitioner's request to leave after the court discussed the matter with all concerned. (The petitioner absented himself over the objections of the prosecutor and his counsel's advice.)

Finally, petitioner is deemed to have abandoned his third issue raised in the district court. David v. Maggio, 706 F.2d 568, 571 (5th Cir. 1983); United States v. Bruscino, 662 F.2d 450, 462 (7th Cir. 1981), cert. denied, 103 S. Ct. 1205 and 1235 (1983); McGraw v. United Ass'n of Journeymen and Apprentices, 341 F.2d 705, 710 (6th Cir. 1965). The search and seizure claim, moreover, clearly is unreviewable in this habeas action. Riley v. Gray, 674 F.2d 522 (6th Cir.), cert. denied, 103 S. Ct. 266 (1982).

For these reasons, this panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of Appellate Procedure. The district court's judgment is, accordingly, affirmed pursuant to Rule 9(d)3, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

John P. Williams  
Clerk

FILED

JUN 28 1983 *Bl*

KENNETH J. MURPHY, Clerk  
COLUMBUS, OHIO

LARRY R. SMITH

Petitioner

vs.

Civil Action C-2-83-481

ARNOLD R. JAGO, Supt.

Respondent

OPINION AND ORDER

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3. ☒ *lexed*  
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5. ☒ *arnal*  
6. ☒ *tion*  
7. ☒ *Ret.*  
8. ☒ *sued*

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under the provisions of 28 U.S.C. §2254. This matter is before the Court on the petition, return of writ, transcript of proceedings in State v. Larry Raymond Smith, No. 81-3 (Muskingum Cty. C.F. Ct. Nov. 1981), and the briefs and exhibits of the parties.

Petitioner was indicted by the January, 1981 Term Muskingum County, Ohio Grand Jury for one count of rape in violation of §2907.02, Ohio Revised Code. Petitioner was tried to a jury which found him guilty as charged. On November 16, 1981 petitioner was sentenced to a term of seven (7) to twenty-five (25) years imprisonment.

Petitioner directly appealed his conviction to the Court of Appeals for Muskingum County, Ohio alleging the following assignments of error:

1. The trial court abused its discretion in refusing to permit the defendant to call two witnesses.
2. The court erred when it placed conditions upon the defendant's right to return to the courtroom after the defendant indicated that he wished to be allowed to voluntarily absent himself from the trial.

On August 3, 1982 the Court of Appeals overruled petitioner's assignments of error and affirmed the judgment of the trial court.

Thereafter, petitioner sought review in the Supreme Court of Ohio. On February 2, 1983, that Court overruled petitioner's motion for leave to appeal and sua sponte dismissed the appeal for want of a substantial constitutional question.

Petitioner alleges that he is in the custody of respondent in violation of the Constitution of the United States in that:

1. The trial court abused its discretion in refusing to permit the defendant to call two witnesses.
2. The court erred when it placed conditions upon the defendant's right to return to the courtroom after the defendant indicated that he wished to be allowed to voluntarily absent himself from the trial.
3. The evidence was unlawfully removed and fabricated.

Petitioner's third ground for relief has never been presented to the Ohio courts. A state prisoner is required to exhaust all available state judicial remedies before he may seek redress by way of petition for federal habeas corpus. Picard v.

Connor, 404 U.S. 270, 275 (1971). If his constitutional claims have not been fairly presented by any procedure available in the state courts, his claims have not been exhausted. 28 U.S.C. §2254(b), (c).

Petitioner explains that the third claim was not presented in the Ohio courts because his attorney refused to do so. Respondent contends that petitioner still has available the remedy of post-conviction relief pursuant to §2953.21, Ohio Revised Code. Consequently, respondent asserts the petition must be dismissed in its entirety for failure to exhaust state judicial remedies as required by 28 U.S.C. §2254(b), (c).

Petitioner's factual allegations concerning his third ground for relief are as follows:

The primary evidence that linked the defendant to the crime were two fingerprints taken from the victim's glasses. The fingerprints were removed from the glasses, and the glasses was [sic] returned the [sic] victim the next day.

As evidenced by the trial record, it is petitioner's position that his fingerprints, which were allegedly taken from the victim's glasses, were not taken from those glasses at all. Rather, petitioner asserts that the fingerprints were removed from his personal objects, which he contends were illegally removed from his home by the sheriff's department.

Under Ohio law, constitutional issues cannot be considered in post-conviction proceedings under §2953.21 of the Revised Code where they have already been or could have been fully litigated, either during trial or on direct appeal. Keener

v. Ridenour, 594 P.2d 581, 586 (6th Cir. 1979); State v. Perry, 10 Ohio St. 2d 175, 180 (1967); State v. Roberts, 1 Ohio St. 3d 36, 39 (1982). Petitioner was aware of his evidentiary claim with respect to the fingerprints at the time of the trial. This is evidenced by the fact that he filed a motion to suppress that evidence, which was overruled by the trial court. Thus, although he had an opportunity to fully litigate the issue both at trial and on direct appeal, petitioner failed to pursue the matter. The claim is therefore not cognizable in a post-conviction proceeding under §2953.21 of the Revised Code. Id.

It is not disputed by respondent that petitioner is precluded from raising the claim in any other state court proceedings. Accordingly, the Court concludes that petitioner has exhausted all available state remedies with respect to his third ground for relief as required by 28 U.S.C. §2254(b), (c).

I

The facts of the case, as presented at trial, are as follows:

On the evening of November 14, 1980 Karen Merry was attending an accounting class at Ohio University in Zanesville. After the class was dismissed at 9:00 p.m., she remained in the building to discuss some questions with her professor. At approximately 9:30, she left the building and proceeded to her car, which was parked in an adjacent lot. As she sat in the car warming the motor up, a man approached from behind. He opened

the driver's door and directed Ms. Merry to move over to the passenger's side of the car.

The man, who was wearing a ski mask, drove the car to Adams Circle. There he pulled off the road into a small turn-off. He stopped the car some ten to twenty yards from the street and sat smoking a cigarette. When Ms. Merry attempted to leave the car, the man placed a knife at her throat and told her that he would kill her if she did not have sexual relations with him. As the man undressed Ms. Merry, he removed her glasses and threw them into the back seat of the car. The man then sexually assaulted Ms. Merry and raped her. He subsequently left the car, directing Ms. Merry how to drive away from the area so as to avoid a ditch. Within one-half hour of the assault, the rape was reported to the police.

Throughout their investigation, the police treated petitioner as a suspect. He lived within 800 yards of Adams Circle, the site of the assault. He was known by police to own a ski mask of the kind described by Ms. Merry. Further, his height, weight, and body build were similar to the description Ms. Merry gave of her assailant.

Petitioner's name was sent, along with lifts of the fingerprints obtained from Ms. Merry's glasses, to the FBI in Washington, D.C. There the fingerprints were positively identified as those of petitioner. He was subsequently arrested in Jacksonville, Florida.

At trial, the state's case consisted primarily of Ms. Merry's testimony, along with other physical evidence connecting

petitioner to the crime: the close proximity of his home to the scene of the rape, the fact that petitioner smoked the same brand of cigarette which was later found in Ms. Merry's car, and the identification of his fingerprints which were found on Ms. Merry's glasses.

Petitioner's alibi defense was that he was in Florida from the end of September, 1980 until his arrest there in January, 1981. Richard Drzewiecki testified that he met petitioner in Jacksonville, Florida during late October, 1980. He saw him at least 3 times a week through the date of the rape. He had no specific recollection of petitioner's whereabouts on November 14, 1980. On cross-examination, Mr. Drzewiecki admitted that he and petitioner were incarcerated together while petitioner was awaiting extradition from Florida to Ohio on the rape charge.

## II

Petitioner's first claim is that the trial court abused its discretion in refusing to permit him to call two witnesses at trial, depriving him of his right to fair trial and to fully develop his defense.

After providing full discovery, the state requested reciprocal discovery from the defense pursuant to Rule 16(c) of the Ohio Rules of Criminal Procedure. The trial court ordered

the defense to provide full discovery by entry filed October 30, 1981. At approximately 4:00 p.m. on the day prior to trial, petitioner provided the state with the name of Richard Drzewiecki, an alibi witness.

On the morning of trial, the state was advised of the names of two additional alibi witnesses, Karen Clapper and Lura Smith. Petitioner's counsel proffered that Lura Smith, petitioner's mother, and Karen Clapper, his sister, would have testified that during October and November, 1980 they each received collect telephone calls from petitioner in Florida. Petitioner also offered a telephone record or records supporting this proffered testimony.

Petitioner's attorney informed the trial court that petitioner had withheld these names from him until the late hours of the day preceding trial. The trial court permitted Mr. Drzewiecki to testify, but precluded petitioner from calling Ms. Clapper or Ms. Smith. The state court of appeals held that this ruling was properly within the scope of the trial court's discretion. Respondent submits that the trial court's ruling with regard to the requirements of Rule 16 of the Ohio Rules of Criminal Procedure is exclusively within the province of the state judiciary.

Petitioner contends that he should not have been held to the technical requirements of the discovery rules with regard to notifying the state of his alibi witnesses. He indicates that he was incarcerated in Columbus until the day preceding the trial, which was held in Zanesville. He asserts that, for this

reason, he had insufficient opportunity to raise the matter with counsel. However, petitioner's attorney state on the record at trial that he had discussed the case with his client on a number of occasions, and that he had repeatedly asked for the names of witnesses who could establish a defense. Petitioner refused to cooperate with him. Petitioner did not mention his mother and sister to defense counsel until the day before trial.

Petitioner further reasons that by providing the state with the name of Mr. Drzewiecki, he placed the state on notice that it would be required to respond to an alibi defense. Because Ms. Clapper and Ms. Smith would have also testified as to the alibi defense, in petitioner's view, the prosecutor would have not been prejudiced or surprised by the last-minute introduction of new defenses.

In a habeas proceeding, a United States District Court does not exercise direct review over state court decisions. Rather, the scope of federal habeas review is confined to errors which are of constitutional dimension. Bell v. Arn, 536 F.2d 123, 125 (6th Cir. 1976). Generally, state court rulings on the admission or exclusion of evidence do not raise constitutional issues. Burks v. Egeler, 512 F.2d 221, 223 (6th Cir. 1975), cert. denied, 423 U.S. 937 (1975); Reese v. Caldwell, 410 F.2d 1125, 1126 (6th Cir. 1969); Gammel v. Buchkoe, 358 F.2d 338, 340 (6th Cir. 1966), cert. denied, 385 U.S. 962 (1966). However, a trial court evidentiary ruling may render the trial so fundamentally unfair as to constitute a denial of federal rights. Logan v. Marshall, 680 F.2d 1121, 1123 (6th Cir. 1982); Gillihan v.

Rodriguez, 551 F.2d 1182, 1191-2 (10th Cir. 1977); Bell v. Arn, supra, 536 F.2d at 125.

The right to present witnesses in one's behalf is a fundamental right made applicable to the states by the due process clause of the Fourteenth Amendment. Chambers v. Mississippi, 410 U.S. 294 (1973); Washington v. Texas, 388 U.S. 14 (1967). However, the right is not absolute; the state may properly condition the admissibility of evidence upon rules which are designed to further legitimate state interests.

The Supreme Court has recognized that states have a legitimate interest in preventing a criminal defendant from concocting a last-minute alibi. Wardius v. Oregon, 412 U.S. 470, 474-475 (1973); Williams v. Florida, 399 U.S. 78, 81 (1970). However, state procedural requirements must conform to the limits of the Constitution. The issue this Court must consider is whether petitioner's trial was rendered fundamentally unfair by the trial court's decision to exclude the testimony of his alibi witnesses as a sanction for failure to comply with the court's discovery order pursuant to Rule 16(c).

The question of whether the exclusion of relevant evidence, such as that provided by an alibi witness, as a sanction for non-compliance with discovery rules violates constitutional principles has been expressly left open by the Supreme Court. Wardius, supra, 412 U.S. at 83 n. 14; Williams, supra, 399 U.S. at 472 n. 4. The circuit courts have split on the issue, some holding that the Sixth Amendment forbids the exclusion of relevant evidence as a sanction to enforce discovery rules

against criminal defendants, United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981); see, United States v. Watson, 669 F.2d 1374, 1383 (11th Cir. 1982), while others hold that such sanctions do not violate the fundamentals of due process. United States v. Smith, 524 F.2d 1288 (D.C. Cir. 1975); Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966).

In United States v. White, 583 F.3d 899 (6th Cir. 1978), the Sixth Circuit examined the issue of whether a trial court abused its discretion in excluding defense alibi testimony to sanction non-compliance with the alibi witness disclosure provisions of Rule 12.1, Fed. R. Crim. P. There the defendant first offered the testimony of alibi witnesses after both the prosecution and the defense had rested their cases. While observing that the trial court has the discretion to rule on the admissibility of evidence, the Court noted that the interest of the defendant in having a fair trial must be carefully balanced against the interest of avoiding surprise and delays. The Court enumerated several factors to consider in striking this balance:

(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for non disclosure, (3) the extent to which the harm caused by non-disclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case.

583 F.2d at 902, quoting from United States v. Myers, 550 F.2d 1036, 1043 (5th Cir. 1977). The Court of Appeals held that the trial court did not abuse its discretion under Rule 12.1 in excluding the defense's alibi witnesses. The constitutionality

of Rule 12.1 was not considered because the defendant did not contend that the compulsory notice provision denied him due process or a fair trial. 583 F.2d at 901, n. 3.

Although the factors enumerated in the White decision were employed to determine whether the trial court had abused its discretion in making an evidentiary ruling, they provide a useful framework for analysis of petitioner's constitutional claim. They are particularly relevant in that the underlying interests are identical in each instance: the fundamental right to a fair trial balanced against the interest of the state in avoiding the unfair surprise of eleventh-hour alibi defenses. Consideration of these factors leads us to conclude that the trial court's evidentiary ruling did not deprive petitioner of a fair trial.

The prosecution in this case was severely prejudiced by petitioner's failure to disclose the names of Ms. Clapper and Ms. Smith until the morning of trial. Had they been permitted to testify, the prosecution would have been deprived of any opportunity to interview the witnesses or investigate their representations. The prosecution would have been thereby prevented from developing any meaningful cross-examination.

Perhaps more importantly, this is not a case in which the evidence was excluded solely as the result of the failure of petitioner's counsel to comply with the discovery procedures. See, Cox v. Cardwell, 464 F.2d 639, 644 (6th Cir. 1972). Counsel for petitioner informed the court that the names of these witnesses had been deliberately withheld by petitioner until the day before trial, in spite of repeated requests by counsel for the

"names of anybody who could help." Despite petitioner's assertions to the contrary, his attorney had visited him on numerous occasions both in Columbus and Zanesville, and petitioner had ample opportunity to discuss this matter with counsel.

In fact, counsel for petitioner made numerous motions to the court requesting that he be permitted to withdraw as counsel, for the specific reason that petitioner had refused to cooperate and assist in his own defense. The court admonished petitioner on several occasions regarding his lack of cooperation with counsel. Since petitioner deliberately thwarted his counsel's efforts to provide him with a fair defense, he cannot now complain that he has been denied a fair trial due to an evidentiary ruling which came as a direct result of his failure to cooperate.

Moreover, the trial court did not exclude all of the alibi evidence. Petitioner testified in his own defense, and Mr. Drzewiecki was also permitted to testify regarding petitioner's alibi. However, in light of the testimony of the state's witnesses and the fact that petitioner's fingerprints were found on the victim's glasses, it is apparent that the jury did not believe the alibi testimony. It is doubtful that the jury would have believed the alibi testimony of two additional witnesses who were both members of petitioner's family. See, White, supra, 583 F.2d at 902.

We agree with the Fifth Circuit that the exclusion in a criminal case of relevant, probative, and otherwise admissible

evidence solely for non-compliance with a discovery rule is an extreme sanction. United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981). However, we believe that there are overriding policy considerations supportive of the trial court's determination in this case. The discovery rules were designed specifically to prevent the occurrence of events such as are presented by this case. The interest of the state in avoiding the concoction of last minute alibis by criminal defendants was compromised in this case by a deliberate withholding of information on the part of petitioner. His two alibi witnesses were both family members, so he certainly knew of their identities and whereabouts. He had ample opportunity to notify counsel of his alibi defense and witnesses. The Criminal Rules were adopted to serve the purpose of ensuring a full and fair trial for all parties in a criminal action. A defendant who deliberately attempts to subvert the policies and provisions of those rules cannot be heard to complain that his trial was unfair when such an attempt has been obstructed.

For the reasons discussed above, the Court concludes that petitioner was not denied a fair trial when the trial court excluded the testimony of his two alibi witnesses as a sanction for his deliberate failure to comply with its discovery order.

### III

Petitioner's second claim for relief is that the trial court erred when it placed restrictions on his right to return to the courtroom after he requested that he be allowed to voluntari-

ly absent himself from the trial.

Petitioner became quite agitated after the trial court refused to permit him to call his two alibi witnesses. See discussion, infra. He engaged in several outbursts with the court, prosecutor and spectators while on the witness stand. Subsequent to his direct testimony and during his cross-examination, petitioner requested that he be permitted to remove himself from the courtroom.

Out of the presence of the jury, the following dialogue took place between the court and petitioner:

THE COURT: All right. Over the objection of the prosecuting attorney and over the recommendation contrary of that the Court is going to grant that request due to the fact that you are the defendant in this case and if you wish to remove yourself from the courtroom, that is your request and that is in the interest of justice. If you wish the Court will proceed with the trial in your absence and so the defendant may be removed at this time. I might point out before you leave for the record that if you should desire to return to the courtroom at any time with the understanding that you would cooperate with your counsel and refrain from any further outbursts, then the Court would discuss that with you at that time and I would probably bring you back. Do you understand what I am saying?

WHEREUPON, THE WITNESS NODDED HEAD INDICATING YES.  
(Transcript at 246).

Petitioner contends that the Court should not have placed these conditions on his return in light of the fact that no finding was made that petitioner failed to cooperate with his attorney or that he was engaging in outbursts.

Respondent argues that under Ohio law the conduct of the trial is within the discretion of the trial judge and that such a question is not cognizable in a federal habeas corpus action.

The right of a criminal defendant to be present during trial proceedings is essential to the fundamentals of due process:

In Fillippon v. Albion Vein Slate, 250 U.S. 76 (1919), the Court observed 'that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.'

Rogers v. United States, 422 U.S. 35, 38 (1975). The Sixth Amendment right of confrontation is so fundamental as to be part of the 'due process of law' guaranteed to defendants in state criminal proceedings by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965); Faretta v. California, 422 U.S. 806 (1975).

However, the right to be present during trial proceedings is not absolute, and may be waived by the defendant. Illinois v. Allen, 397 U.S. 337, 343 (1970); Snyder v. Mass. 291 U.S. 97, 99 (1934). If the defendant knew or should have known of his right to be present, his voluntary absence from the proceedings presents no constitutional violation. Taylor v. United States, 414 U.S. 17, 19-20 (1973); Diaz v. United States, 442, 445 (1912).

In holding that a defendant's conduct may justify his forced removal from the courtroom, the Supreme Court noted that there was nothing unconstitutional in the procedure of allowing the defendant to return to the courtroom "as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Illinois v. Allen, 397 U.S. 337, 343 (1970), reh. denied, 398 U.S. 915 (1970). The same is true for cases in which the defendant has voluntarily removed himself from the courtroom.

The trial court has the right and responsibility to control the conduct of all persons who appear in the courtroom. The trial judge certainly requires nothing unduly burdensome when he asks only that the defendant refrain from disrupting the proceedings and make some effort to cooperate in his own defense in order to be allowed to return to the courtroom. Accordingly, the Court finds that petitioner's second claim is without merit.

#### IV

Petitioner's third ground for relief is that evidence connecting him to the crime was "unlawfully removed and fabricated." Petitioner contends that the fingerprints linking him to the crime were not found on the victim's eyeglasses, but were obtained from his personal property taken during searches of his home. At trial, petitioner testified to his belief that his fingerprints were obtained from objects which were removed from his home during illegal searches conducted by the police.

The United States Supreme Court held in Stone v. Powell, 428 U.S. 465, 494 (1976) that:

where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search and seizure was introduced at trial.

The United States Court of Appeals for the Sixth Circuit has determined that the application of Stone v. Powell, supra, requires a two part analysis:

Initially, the district court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim. ... Second, the Court must determine whether presentation of the claim was in fact frustrated because of the failure of that mechanism.

Riley v. Gray, 674 F.2d 522, 526 (6th Cir. 1982).

The Court of Appeals further held in Riley v. Gray, supra, 674 F.2d at 526 that the Ohio procedural mechanism for considering Fourth Amendment claims provides an adequate opportunity for review of those claims. Therefore, our inquiry turns to whether presentation of petitioner's claim was frustrated by a failure of that mechanism.

The Court has reviewed the suppression hearing and concludes that petitioner was permitted to fully and fairly present his Fourth Amendment claims. Thus, petitioner is not entitled to relief in federal habeas corpus on this basis.

With regard to the allegation that the evidence in the case was fabricated, petitioner has failed to point to any evidence which would substantiate his claim. The Court has carefully reviewed the hearing on the motion to suppress and the fingerprint testimony adduced at trial. Petitioner's counsel cross-examined each witness at length regarding the origin of the fingerprints. The jury apparently found that there was insufficient evidence to establish that the fingerprints found on the victim's glasses were not those of petitioner. Overall, there is nothing in the trial record suggestive of improper conduct on the part of the police or prosecutor. A claim for relief in a habeas corpus proceeding must rest on something more substantial than conclusory allegations unsupported by the record.

The Court holds that petitioner's third claim for relief does not raise the possibility of constitutional error and is therefore not cognizable in habeas corpus. Accordingly, petitioner's third claim for relief is DENIED.

WHEREUPON, the Court HOLDS that the petition is without merit; and, therefore, it is DENIED.

This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for respondent.

*Joseph P. Kinneary*  
United States District Judge

18

A22

<b>United States District Court</b>		DISTRICT <b>Southern District of Ohio</b>	Judge <b>Inducted</b> <b>Reinstated</b> <b>Resigned</b> <b>Retired</b> <b>Transferred</b>
CASE TITLE <b>Larry R Smith</b> <b>v.</b> <b>Arnold R Jago, Supt.</b>		DOCKET NUMBER <b>C-2-83-481</b>	
		NAME OF JUDGE OR MAGISTRATE <b>Judge Joseph P. Kinneary</b>	
<input type="checkbox"/> Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.			
<input checked="" type="checkbox"/> Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.			
IT IS ORDERED AND ADJUDGED			

The petition is without merit and is denied. This action is dismissed.  
Judgment is for the respondent.

**RECEIVED**  
OFFICE OF THE ATTORNEY GENERAL  
FEDERAL LITIGATION SECTION

JUN 28 1983

JUN 28 10 25 AM '83  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
COLUMBUS, OHIO

CLERK <b>Kenneth J. [Signature]</b>	DATE <b>June 28, 1983</b>
--	------------------------------

A23

THE STATE OF OHIO,

City of Columbus.

County of Ohio,

Appellee,

vs.

Raymond Smith,

Appellant.

11 13 TERM

To wit: February 2, 1983

No. 82-1290

APPEAL FROM THE COURT OF  
APPEALS

for MUSKINGUM County

This cause, here on appeal as of right from the Court of Appeals for  
MUSKINGUM County, was considered in the manner prescribed by law, and,  
no motion to dismiss such appeal having been filed, the Court sua sponte dismisses  
the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to  
the Clerk of the Court of Appeals for MUSKINGUM County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the  
foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

\_\_\_\_\_, Clerk

\_\_\_\_\_, Deputy

141 59-28

A24

THE STATE OF OHIO

City of Columbus.

County of Ohio,

Appellee,

vs.

Raymond Smith,

Appellant.

11 13 TERM

To wit: February 2, 1983

No. 82-1290

MOTION FOR LEAVE TO APPEAL  
FROM THE COURT OF APPEALS

for MUSKINGUM County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, \$20.00, paid by \_\_\_\_\_ affidavit of poverty

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the  
foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

\_\_\_\_\_, Clerk

\_\_\_\_\_, Deputy

142

60-23

A25

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO,  
Plaintiff-Appellee

JUDGES:  
Hon. Robert E. Henderson, P. J.  
Hon. Norman J. Putman, J.  
Hon. John R. Milligan, J.

-vs-

LARRY RAYMOND SMITH,  
Defendant-Appellant:

OPINION

Case No. 81-CA-18

Decided: *Aug 9 1982*

APPEARANCES:

W. ALLEN WOLFE,  
PROSECUTING ATTORNEY  
MUSKINGUM COUNTY, OHIO  
28 North Fourth Street  
Zanesville, OH 43701

ATTORNEY FOR PLAINTIFF-APPELLEE

BRENT A. STUBBINS  
STUBBINS, PHILLIPS & CO., L.P.A.  
925 Military Road  
P.O. Box 1269  
Zanesville, OH 43701

ATTORNEY FOR DEFENDANT-APPELLANT

MILLIGAN, J.

The defendant was convicted in the Muskingum County Court of Common Pleas by a jury of Rape, R. C. Section 2907.02. The trial court thereupon sentenced him to 7 to 25 years. He appeals, assigning two errors:

I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT THE DEFENDANT TO CALL TWO WITNESSES.

II. THE COURT ERRED WHEN IT PLACED CONDITIONS UPON THE DEFENDANT'S RIGHT TO RETURN TO THE COURTROOM AFTER THE DEFENDANT INDICATED THAT HE WISHED TO BE ALLOWED TO VOLUNTARILY ABSENT HIMSELF FROM THE TRIAL.

I.

(C) Disclosure of evidence by the defendant.  
(1) Information subject to disclosure....  
(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), [which was done in this case] the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial...."

Cr. R. 16(c).

This controversy centers around the fact that the defendant did not comply with these discovery rules. Instead, late in the day before the trial the defendant provided the name of Richard Drzewiecki as an alibi witness. On the day of trial, the prosecutor was advised of two other names "added to the discovery, Karen Clapper and Lura Smith and also an attachment of phone calls from Florida." (Tr. 12) It is further clear from the record that the latter two names and the phone bill were deliberately withheld from defendant's attorney by the defendant. (Tr. 13, 14)

The Criminal Rules provide:

(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances. (Emphasis added)

Cr. R. 16(E)(3).

We find that the trial court acted within the scope of his discretion in permitting the testimony of the earlier (albeit late) identified witness Drzewiecki, and in denying the defendant's proffer of the other two witnesses and the telephone bill.

To allow a defendant to use the argument of a disagreement with his counsel as an excuse to run roughshod over the Criminal Rules, would be

to punish the diligent and reward the obstreperous. In that effort we do not abide.

State v. Edwards, 49 Ohio St. 2d 31, 3 O.O. 3d 18; State v. Mitchell, 47 Ohio App. 2d 61, 1 O.O. 3d 181, 352 N.E. 2d 636, do not stand for the proposition that the order of the trial court in this case amounts to an abuse of discretion.

The first Assignment of Error is overruled.

## II.

The incident referred to in the second Assignment of Error, culminating in the defendant voluntarily absencing himself from the trial of the case, occurred during the time in the trial when the defendant, after testifying on his own behalf upon direct examination, was being cross-examined. It is clear from an examination of the record, beginning at page 235, that the defendant became increasingly cantankerous on the witness stand. The court repeatedly cautioned him. When there was an outburst in the courtroom the defendant's counsel moved for a mistrial. The court overruled such motion on the ground the outburst was provoked by defendant himself.

After a long explanation by the trial court of his rulings upon the right of the defendant to call witnesses (the subject matter of the first Assignment of Error), defendant said, "If I'm not allowed to call my wit-

uses, then I'll leave court." (Tr. 242.) Whereupon the trial court said, "You will remain right here.... Mr. Smith: He'll take me back. The Court: --and sit next to your counsel and cooperate with your counsel." 4."

Following a recess, the defendant made a voluntary decision to quit the courtroom. The prosecutor objected on the ground that it interfered with his right of cross-examination. (Tr. 234.)

Finally, the court said:

"THE COURT: All right. Over the objection of the prosecuting attorney...the Court is going to grant that request due to the fact that you are the defendant in this case and if you wish to remove yourself from the courtroom, that is your request and that is in the interest of justice. If you wish the Court will proceed with the trial in your absence and so the defendant may be removed at this time. I might point out before you leave for the record that if you should desire to return to the courtroom at any time with the understanding that you would cooperate with your counsel and refrain from any further outbursts, then the Court would discuss that with you at that time and I would probably bring you back. Do you understand what I am saying?"

WHEREUPON, THE WITNESS NODDED HEAD INDICATING YES."

Tr. 245.

We find that the trial court acted within its discretion in granting the wish of the defendant and qualifying his voluntary removal with the statement that if he chose to return the court would discuss that matter with

him as it related to the prior outbursts and his failure to cooperate with counsel. The defendant does not direct us to any authority that would deny the trial court the right and responsibility to control the present and future conduct in the courtroom of any witness, including the defendant.

The second Assignment of Error is overruled.

The judgment of the Muskingum County Court of Common Pleas is affirmed.

Henderson, P.J., and

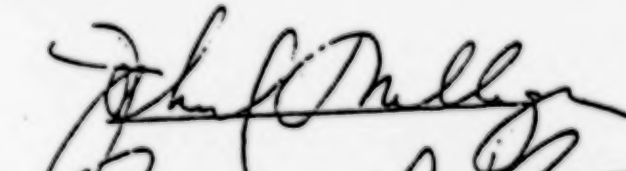
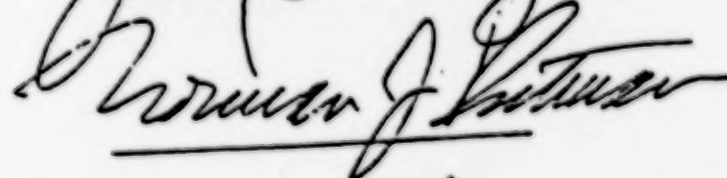
Putman, J., concur

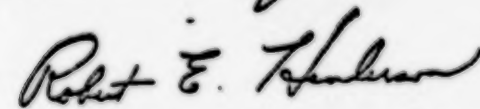
*Robert E. Henderson*  
*Thomas J. Putman*  
*Robert E. Henderson*  
 JUDGES

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO, :  
Plaintiff-Appellee :  
-vs- : JUDGMENT ENTRY  
LARRY RAYMOND SMITH, :  
Defendant-Appellant : CASE NO. 91-CA-18

For the reasons stated in the Memorandum-Opinion on file,  
both Assignments of Error are overruled, the judgment of the Muskingum  
County Court of Common Pleas is affirmed, and this cause is remanded to  
that court for further proceedings according to law.



JUDGES.

1 the day of trial, for lack of another  
2 way to put it. Also we have no oppor-  
3 tunity to verify the source of these names  
4 and we would ask the Court in the interest  
5 of fair play and of course, under the rules  
6 that Karen Clapper and Lura Smith not be  
7 allowed to testify and I don't -- I, you  
8 know -- it's not our fault that counsel and  
9 the defendant didn't give the prosecutor  
10 the names. Either one of them could have.

11 THE COURT: Mr. Graham, do you wish  
12 to respond to that?

13 MR. GRAHAM: Yes, your Honor. As  
14 indicated in my previous comments, the  
15 names of potential witnesses that possibly  
16 could be beneficial to my client as he  
17 perceived that potential to be were withheld  
18 from me. On several occasions that I met  
19 with my client, both on occasions when I  
20 met with him in Columbus and here in Zanesville  
21 prior to his moving to Columbus, I asked for  
22 any names of anybody who could help. The name  
23 of Richard Drzewiecki that Mr. Wolfe mentioned  
24 had been mentioned to me previously. He had  
25 been unable to find this man and had given

1 up hope of finding him and then mysteriously  
2 he got a phone call from him yesterday and  
3 that's the reason I didn't inform Mr. Wolfe  
4 prior to the day of the trial because I  
5 didn't know that an attempt was made for  
6 this man to be here until yesterday and  
7 as far as the other names appearing on the  
8 list, Karen Clapper and Lura Smith, it  
9 was only yesterday at a morning conference  
10 with my client that he mentioned that he  
11 would like to have these people come and  
12 testify for him and that it was late  
13 yesterday when he was attempting to get  
14 hold of these people and it was only this  
15 morning that Mrs. Lura Smith indicated to  
16 me that she would come and testify to certain  
17 telephone calls she had received and that  
18 is the reason why I had such a little notice  
19 here.

20 THE COURT: Well, as I would understand  
21 it, there's no objection to Mr. Drzewiecki  
22 or whatever his name is testifying, is that  
23 right, Mr. Wolfe?

24 MR. WOLFE: I would say in the interest  
25 of fair play that we don't know who he is

(14)

1 conference with your teacher and you proceeded out through  
2 the side door to where you parked your car, is that right?  
3 A Un-huh.  
4 Q Now what did you do at that point?  
5 A Well, I got in and -- well, I unlocked the door  
6 and got in and I started up the car and it took a long  
7 time for it to warm up.  
8 Q Was it cold like it was again --  
9 A It was kind of a chilly evening.  
10 Q -- in November?  
11 A Un-huh.  
12 Q And was the door of your car closed at that time?  
13 A Yes.  
14 Q And you were revving your motor up, trying to get  
15 it heated up?  
16 A Un-huh.  
17 Q What happened at that time?  
18 A Well, I was about ready to put it in gear and  
19 drive out and a guy came up from behind me and opened my  
20 car door and told me to scoot over because he had to get  
21 out of the area.  
22 Q Now do you know what direction he came from?  
23 A He came somewhere behind my car 'cause I always  
24 backed in towards -- well, it was backed in towards the  
25 teacher's lot facing the back end of the parking lot so

(35)

1 he came up somewhere behind the parking lot.  
2 Q So your car was facing -- was your car facing  
3 this direction?  
4 A No, the other way.  
5 Q Your car faced Newark Road?  
6 A Nun-uh.  
7 Q And so your car did not face the Newark Road?  
8 A No, it faced the back of the parking lot.  
9 Q Okay. Well, so you were looking this direction?  
10 A Yes.  
11 Q And where did the man come from?  
12 A From behind my car.  
13 Q So he came from somewhere in this direction?  
14 A Un-huh.  
15 Q Now how did you know that he was serious about  
16 that, I mean, did he just --  
17 A He put the -- like he put his fist up against my  
18 shoulder and it felt like it had a pointed edge to it.  
19 Q It more or less stuck your shoulder?  
20 A Un-huh.  
21 Q So then did he then assume a position behind your  
22 wheel?  
23 A Yes, he told me to scoot over and he got behind  
24 the wheel.  
25 Q And then what did you do?

(36)

1 A Then he came out the far end of the parking lot  
2 and drove to Adams Lane and went down Adams Lane.  
3 Q Now -- and then you were in the passenger's  
4 side --  
5 A Un-huh.  
6 Q -- is that right?  
7 A (WITNESS NODDED HEAD INDICATING YES).  
8 Q Now can you draw where you -- where the man drove  
9 to from which exit and take us to where you live. You lived  
10 on Adams Lane, I believe, is that right?  
11 A We went out that way -- that exit.  
12 Q Is that the one that's closest to the bank?  
13 A Yes, there's the bank right there and we drove  
14 down Adams Lane. Right here is where we were.  
15 Q You are indicating a spot approximately on the  
16 corner of Adams Lane and Newark Road that's back in the  
17 woods a little bit?  
18 A Yes, it sets back in the woods.  
19 Q And did you proceed down Adams Lane?  
20 A Yes, we went down and went over the little bridge.  
21 Q Past Armco Park -- do you know where that is?  
22 A Yes.  
23 Q So the scene of this alleged incident, can you  
24 mark that with an X?  
25 WHEREUPON, THE WITNESS COMPLIED

(37)

1 WITH REQUEST OF COUNSEL.  
2 A I think right in here someplace.  
3 WHEREUPON, THE WITNESS RESUMED  
4 THE WITNESS STAND.  
5 Q And that's between a street down at Adams Circle,  
6 which is not to be confused with Adams Lane and Somers Street,  
7 is that right?  
8 A Yes.  
9 Q Now did you go directly out of that parking lot?  
10 Did he take you directly out of that lot?  
11 A Yes -- well, we stopped a little bit to let some  
12 cars through because some classes were getting out about  
13 the same time.  
14 Q Now did he ask you anything on the way to this  
15 spot on Adams Lane?  
16 A He asked me my name, age and where I lived.  
17 Q What did you tell him?  
18 A I told him my name was Karen and I was eighteen  
19 years old and I was from McConnellsville.  
20 Q Okay. That wasn't true, was it?  
21 A No.  
22 Q Now -- so you were familiar with Adams Lane because  
23 you had lived on Adams Lane for three months, hadn't you?  
24 A Yes.  
25 Q And had you traveled that direction in the past?

(38)

1 A Yes. My mom was in the hospital that day and I  
2 took my dad out through that way to get to the hospital --  
3 out to Bethesda.  
4 Q Had you traveled it before?  
5 A Yes -- well, my eye doctor is also on Maple Avenue  
6 so I go out that way to get my glasses straightened up.  
7 Q So you knew your way from the spot of the incident  
8 back to the dormitory because you travel that way, is that  
9 correct?  
10 A Yes.  
11 Q Now what -- if you have an estimate or if you can  
12 recall, I realize it's been a year ago, how long did it  
13 take you to get from that parking lot through that area?  
14 A Probably about anywhere from two to five minutes.  
15 And, of course, when you passed the dormitory  
16 you made no reference to that's where you lived or anything,  
17 did you?  
18 A No.  
19 Q So we are talking now you are leaving about 9:30,  
20 you might have been three minutes, five minutes later on --  
21 that's just approximate, is that correct?  
22 A Yes.  
23 Q Now upon arriving at this -- now is this somewhat  
24 off the road?  
25 A Yes, it was set back from the road.

(39)

1 A Well, he turned the car off and turned off the  
2 lights and he said that everything would be all over in  
3 just a few minutes and he lit up a cigarette and about that  
4 time I was about ready to get out the door to see if, you  
5 know, I could run and he put out the cigarette and he told me  
6 not to. He put a knife to my throat and told me no.  
7 Q You say he put a knife to your throat?  
8 A Un-huh.  
9 Q Now how long did he smoke this cigarette?  
10 A Not too long at all. It was just like he lit  
11 it up and put it back.  
12 Q He told you what again?  
13 A He told me not to get out of the car that he  
14 wanted to have intercourse with me.  
15 Q Or what?  
16 A Or else he would kill me.  
17 Q And what did his knife look like?  
18 A About 6 inches long, had like a dark handle.  
19 Q Now how did you know it was a knife?  
20 A Because it had a point and he told me it was a  
21 knife.  
22 Q And it was at your throat, right?  
23 A Yes.  
24 Q And, of course, is that his exact words or is  
25 that the substance of what he said?

(42)

A40

1 A The substance.  
2 Q And then what, if anything, did he want you to do?  
3 A Then he wanted me to lay down in the seat.  
4 Q And then what did he do next?  
5 A Then he proceeded to undress me; he undid my  
6 blouse.  
7 Q Did he kiss you or touch you or --  
8 A Yes.  
9 Q And where did he do that?  
10 A On my breasts.  
11 Q Did he touch any other place at that time?  
12 A Yes.  
13 Q What did he touch?  
14 A My lower part.  
15 Q Your vagina?  
16 A Yes.  
17 Q So at this point did you know where he had the  
18 knife at this point?  
19 A No, I didn't know what he did with it.  
20 Q And is he still in the driver's side and you are  
21 still in the passenger's side?  
22 A No, I'm laying across the seat and he's on the  
23 passenger's side.  
24 Q It's sort of like --  
25 A Yes.

(43)

A41

1 Q Then how much of your clothes did he remove?  
2 A Just my left leg of my pants.  
3 Q You mean he took those clear down, is that right?  
4 A Yes.  
5 Q And did he remove anything else from your body?  
6 A He removed my left shoe.  
7 Q Your left shoe?  
8 A Uh-huh.  
9 Q Did he remove anything from your upper body?  
10 A Yes, he pulled up my bra.  
11 Q Did you have glasses on that night like you have  
12 today?  
13 A Yes, I had the same ones on and he took them off  
14 and threw them in the back seat.  
15 Q At what point did he do that?  
16 A When he told me to lay down.  
17 Q He just -- how did he do that, just --  
18 A He just reached up and threw them in the back seat.  
19 Q And then proceeded to disrobe you, is that correct?  
20 A Yes.  
21 Q Now did he take his own clothes off or how did  
22 he disrobe?  
23 A Well, he just pulled down his pants.  
24 Q And at that point did he have intercourse with you  
25 or --

(44)

1 A Yes.  
2 Q Now many times?  
3 A Several times.  
4 Q Did he have you submit to oral sex?  
5 A Yes, he did.  
6 Q Now how long did this -- approximate time frame --  
7 did this last from the time you arrived at the scene 'til  
8 it was over?  
9 A I'd say about a half hour.  
10 Q Now did -- how was he dressed when he originally  
11 approached you in the parking lot?  
12 A He had on blue-jeans or some kind of dark pair of  
13 pants and he had on a mask.  
14 Q Now would you describe that mask to the jury?  
15 A Oh, it was kind of like a dark color and it just  
16 had one hole for the eyes, kind of an oblong.  
17 Q And did he leave that on throughout the incident?  
18 A Yes.  
19 Q What other descriptions other than his clothes or  
20 physical description do you recall?  
21 A Well, he was kind of tall, about 5'8, 5'11 and he  
22 was pretty well thin -- he was slender.  
23 Q Now I assume that there's a point in time -- I  
24 guess you said approximately a half hour later that this  
25 stopped?

(45)

1 A Yes.

2 Q And what did he do then?

3 A Well, he told me to get dressed and so he got  
4 dressed too and he asked me if I knew how to get out and  
5 I told him yes, I did and so I went to go and I started the  
6 wrong way; I turned left and he yelled at me and said,  
7 "Wait", said, "There's a ditch that way; don't go that way"  
8 and so I backed up and turned right then and went out.

9 Q What did he do with the knife when he -- I assume  
10 he got out of the car?

11 A Yes.

12 Q And that's when he told you about the ditch?

13 A Yes, when I started to drive away.

14 Q What did he do with the knife?

15 A He stuck it under his arm and held it.

16 Q And it was pitch dark at that point, is that right?

17 A Yes.

18 Q And you had no knowledge of a ditch, did you?

19 A I didn't see any. It looked like the quickest way  
20 to the road to me.

21 Q Now at the point where this rape or several rapes  
22 occurred, was it -- it was dark and about how far off the  
23 road was it?

24 A Not too far. I'd say about 10, 20 yards.

25 Q And was it covered in the way of bushes?

(46)

1 A There's -- well, it was in the fall of the year --  
2 like it looked like it hadn't been mowed; it was just tall  
3 weeds.

4 Q I'll show you these items marked for purposes of  
5 identification as B-1, B-2, B-3 through B-9 and ask if you  
6 can identify the picture there?

7 A (WITNESS NODDED HEAD INDICATING YES). These are  
8 all the car.

9 Q It's a '69 --

10 A Buick Skylark.

11 Q I show you Exhibit B-7 and ask you what's in the  
12 rear floor?

13 A It's a rug I use for my feet and there's a flashlight  
14 and my glasses.

15 Q How long had you had that car?

16 A Oh, I got it in either August or September the year  
17 before. I had it for just roughly a year.

18 Q I will show you what's been marked for purposes  
19 of identification as State's Exhibit D. Can you identify  
20 what that picture is?

21 A Those are my glasses.

22 Q Now when's the last time you saw those glasses?

23 A When they hit -- when they flew through the air  
24 to the back seat.

25 Q And --

(47)

1 A None.  
2 Q And what was your main concern -- I mean I am sure  
3 you had several concerns but what was your main concern at  
4 the scene of the rape?  
5 A Oh, at first I thought he was going to kill me  
6 because he kept on threatening me and stuff but he didn't.  
7 Q Did the man use a lot of profanity?  
8 A A few words.  
9 Q So after you went back -- when you went back to  
10 the dorm, which is on the same street?  
11 A (WITNESS NODDED HEAD INDICATING YES).  
12 Q And where did you go from there?  
13 A I went to Room 3 and a couple of my friends were  
14 in there that were -- well, they were medical lab students  
15 at M.A.T.C.; they had to work.  
16 Q Now about what time frame are we in at this point?  
17 A Shortly after 10.  
18 Q How do you know that?  
19 A The show Dallas was on.  
20 Q So then you went to the hospital?  
21 A Yes.-- well, we went to the scene first. The deputy  
22 took me to the scene and then I showed him about where it was  
23 and then we went to the hospital.  
24 Q So you did that that same night?  
25 A Yes.

(49)

A46

1 Q And if you will, what did you do at the hospital  
2 then?  
3 A I went through all kinds of tests.  
4 Q Now were your parents called at that time?  
5 A When I got back they called my parents from in the  
6 dorm and they met me at the hospital.  
7 Q And how long were you at the hospital?  
8 A About three, four hours.  
9 Q So you went on then past midnight --  
10 A Yes.  
11 Q -- is that right?  
12 A (WITNESS NODDED HEAD INDICATING YES).  
13 Q Now have you ever seen or heard of Larry Raymond  
14 Smith before in your life?  
15 A No.  
16 Q And of course, you are certainly not his spouse,  
17 is that correct?  
18 A No.  
19 Q And all these things occurred in Muskingum County,  
20 Ohio, isn't that correct?  
21 A Yes.  
22 Q Now you indicated that he did smoke a cigarette.  
23 Did you ever know what he did with that cigarette?  
24 A I have no idea. I didn't know whether he threw it  
25 out or what he did with it.

(50)

A47

1 A Document G-1 is the one that I fill out, the routine  
2 emergency room record that we kept at Good Samaritan Hospital  
3 and G-2 is a part of a kit that we routinely use in rape  
4 cases explaining all of the findings and information that  
5 we obtain during our examination.

6 Q And upon looking at the Exhibit G-1, does that  
7 refresh your memory in any way about Karen Merry?

8 A Yes. She presented to the emergency room. I did  
9 not see her initially; I was told that she was back in one  
10 of the examining rooms and that she stated that she had been  
11 raped. When I first saw her she was very tearful, quite upset  
12 and had indicated that she had been forced to have oral and  
13 vaginal or general sex at knife point.

14 Q And what procedure did you take at that time?

15 A We do a routine examination with the patient  
16 completely unclothed except for a hospital gown and we  
17 do examination of the whole body, all extreme surfaces and  
18 all of the body cavities and we essentially performed that  
19 examination.

20 Q Pardon me; I didn't hear you.

21 A We performed the examination as to this.

22 Q And what were your findings?

23 A She did have some evidence of body trauma in that she  
24 had an abrasion of the -- I believe it was the right shoulder  
25 and had some lineal scratches, a type of injury that a scrape

(78)

A48

1 across a firm surface such as concrete or blacktop or the  
2 ground. She also had a very tender left wrist but the  
3 wrist did not seem to be swollen and did have its full  
4 range of motion. There was no bruising that I could see  
5 otherwise on the body. On her pelvic examination she did  
6 have a rather swollen, edematous introitus, which would be  
7 the lips of the vagina were red and swollen. The vaginal  
8 vault had a thick, cloudy fluid, whitish in color and that  
9 was aspirated and a wet prep of it revealed many mobile  
10 sperm present. The cervix otherwise was normal and the  
11 bimanual examination, which is the examination we palpate  
12 the pelvis area, showed no other evidence of injury  
13 or pathology. The oral cavity was normal to my examination  
14 as I recall from the records that I could see. And that  
15 this was pretty much the pertinent findings. The rest of  
16 the examination was normal.

17 Q Now on Exhibit G-1 and G-2, can you identify your  
18 signature on there as being your signature --

19 A Yes, they are.

20 Q -- on both documents?

21 A Un-huh.

22 Q And how long have you been licensed to practice  
23 in Ohio?

24 A I've been licensed now two and a half years.

25 Q Taking all the procedures that you just testified

(79)

A49

1 A It would take on a drive less than probably two  
2 minutes.  
3 Q If you were walking --  
4 A It would be approximately five minutes, four to  
5 five minutes.  
6 Q Now how do you know it's 800 feet from that scene?  
7 A Okay. The scale miles on this map is 1 inch equals  
8 200 feet and if one would measure from his front door to the  
9 scene of the crime it is 4 inches. So that, of course, would  
10 be 800 feet in a straight line and we measured both by an  
11 automobile and by walking the two-tenths of a mile in a  
12 car and then it would take approximately four to five minutes  
13 to walk it and approximately two minutes or so to drive  
14 it from the crime scene to his front door step.  
15 Q 800 feet, how many football fields is that?  
16 A It would be approximately two and a half football  
17 fields. There is a football stadium here which one can see.  
18 It would be approximately two of these football stadiums  
19 and a half possibly.  
20 Q Why don't you take the stand.  
21 WHEREUPON, THE WITNESS RESUMED  
22 THE WITNESS STAND.  
23 Q Well, at that point did you attempt to search then  
24 for Larry Raymond Smith?  
25 A Yes, sir. After the first suspect was relatively

(90)

1 cleared by his alibi witnesses, we did attempt to intensify  
2 the search for Larry Raymond Smith.  
3 Q And were you able to interview Larry Raymond  
4 Smith?  
5 A No, sir, we were never able to ever find him  
6 at home or at any other location.  
7 Q Did you go to the home?  
8 A Yes, sir, I went to the home almost daily and also  
9 to the home of his parents and also to the home of one brother  
10 almost daily between the 15th of November, 1980 to the early  
11 part of January 1981.  
12 Q Was his wife and family always there?  
13 A They were always there until the early part of 1981.  
14 Q What about the family vehicle, was it there?  
15 A The family vehicle was there between the 15th of  
16 November, 1981 and December the 26th, 1980 -- both years were  
17 in 1980.  
18 Q So you mean November 15th -- would you say that  
19 again, please?  
20 A From November 14th, 1980 until December the 26th  
21 1980 the vehicle was always there at the residence.  
22 Q What kind of vehicle was it?  
23 A It was a Ford Galaxie 500, dark red in color with  
24 the license number 6392TW.  
25 Q And how did you know it was always there?

(91)

1 stop made of the vehicle but I'm not sure what they -- the  
2 circumstances around that.

3 Q Do you know if any items were removed from the  
4 car?

5 A To my knowledge, other than what I've already  
6 said pursuant to the search warrant to my knowledge no items  
7 were ever removed from the Smith vehicle.

8 Q I believe earlier in your testimony -- your  
9 direct testimony -- you indicated that you became aware  
10 that Larry Smith had access -- immediate access, as I recall  
11 your testimony, to a ski mask.

12 A Yes, sir, I did.

13 Q At what time did you find this out?

14 A I became aware that Larry Raymond Smith had  
15 immediate access to a ski mask on September the 26th, 1980.

16 Q And how did you find this out?

17 A On September the 26th, 1980, myself and Det.  
18 Larry Paul went to the Smith residence to talk with Lar  
19 Raymond Smith. He was not at home and we did interview  
20 his wife and she did sign a search warrant to search her  
21 motor vehicle which was parked in front. The 1969 off-red  
22 Ford bearing license number 6392TW. And in that search  
23 underneath the driver's side of the front seat was an off-  
24 brown, dark in color ski mask with one oblong hole for  
25 both eyes with no hole for a mouth, ears or nose.

(95)

A5

1 was maybe a week and a half, you know, two weeks at the most  
2 before that that he had been out to my place to see it.  
3 Q When you say he had been out to see it, are you  
4 referring to Mr. Smith?

5 A Yes, I am.

6 Q And is it your testimony that while you were  
7 attempting to sell this motorcycle when you resided in  
8 Florida that Mr. Smith showed some interest in that  
9 motorcycle and --

10 A Yes, he did.

11 Q -- was with you to discuss the motorcycle at some  
12 time prior to November the 18th?

13 A Right.

14 Q And how many times was he with you?

15 A He was with me to see the bike -- it had to be  
16 three times, at least three times, and then I talked to  
17 him other times in the past because he used to come in  
18 the bar for a drink and I saw him, you know, countless  
19 times prior to that.

20 Q Can you tell the jury approximately when the  
21 first time was that Mr. Smith expressed some interest in  
22 the bike?

23 A I believe it would have been right around the  
24 1st of November, somewhere around there, 1st or 3rd.

25 Q And would that have been in 1980?

(200)

A53

1 A Yes.  
2 Q And where did this conversation take place?  
3 A That was at the R & R Bar.  
4 Q When, if you can recall, did the second or third  
5 meeting with regard to this bike take place?  
6 A Like I say, that was all within that period of  
7 time up until I'd say the 18th when I sold it. After I  
8 sold it I never even brought the subject back up to  
9 him. I had seen him after that too and then I had to go --  
10 I had left because I had to go up to Pennsylvania at my  
11 residence there and then I ended up moving to New York  
12 right after that.  
13 Q Did you have occasion to see Mr. Smith after the  
14 18th of November?  
15 A Yes, it was right around that time. It wasn't too  
16 much after. It would have been maybe -- I think I moved  
17 in the 21st or 22nd back in New York but I had seen him  
18 all the way up to then because that's when I saw him when  
19 I had my bike, things like that.  
20 Q When you are saying 21st and 22nd, are you speaking  
21 of November?  
22 A Of November, right.  
23 Q Do you have any memory of the meeting nearest  
24 the time of the sale of the bike when you spoke with Mr.  
25 Smith about it?

(201)

1 A I'd say it would have been about the 9th or 10th,  
2 somewhere around in that time and then I think I might have  
3 seen him somewhere like maybe the 15th or something at the  
4 bar because he didn't come out to see it because the other  
5 gentleman had give me some money for down payment on it.  
6 Q So the last time that Mr. Smith spoke to you  
7 about the motorcycle may have been the 9th or 10th of  
8 November --  
9 A Right.  
10 Q -- is that what you said? And am I correct that  
11 you are now testifying that you saw Mr. Smith and spoke  
12 to Mr. Smith sometime between the 9th and 10th of November  
13 and the 18th of November?  
14 A Yes.  
15 Q How often did that happen?  
16 A It would not be every day. You know, like even  
17 way back to exact dates I couldn't say for sure but he  
18 would come in at least three times a week -- of that week  
19 and usually in the earlier part of the day and then he  
20 would stop back in the evening.  
21 Q Is the individual that you know to be Larry Raymond  
22 Smith sitting in the courtroom?  
23 A Yes, he is.  
24 Q And could you point him out to us, please?  
25 A He's sitting at the table -- sitting over there.

(202)

1 THE COURT: The Court will  
2 overrule the objection. This is  
3 cross-examination -- this is proper  
4 cross-examination.  
5 Q. Now then you were together during that time,  
6 isn't that correct?  
7 A Part of it, yes.  
8 Q And where were you?  
9 A In Jacksonville, Florida.  
10 Q Were you in jail together?  
11 A Yes, we was.  
12 MR. GRAHAM: Objection, your Honor.  
13 Q Well, why don't you answer that?  
14 THE COURT: Objection.  
15 Q In other words, you were in jail together during  
16 those months and were friends, is that right?  
17 A Not really. I know him from personally out on  
18 the street prior to that. I had run into him while I  
19 was incarcerated and he had moved to that -- that he had  
20 charges pending on him, that I did not know. He came to  
21 me in the period of time I knew him before. At that time  
22 I gave him my name and address and told him if he needed  
23 me to contact me.  
24 Q So the same man that you had this deal with the  
25 motorcycle with in November fortuitously or by chance you

(209)

1 A He bought cars at an auction and I would go with  
2 him and I would drive them back. There was five or six  
3 of us that did it.  
4 Q How were you paid?  
5 A He paid us every day.  
6 Q Were you paid hourly?  
7 A Yes.  
8 Q How much were you paid?  
9 A \$2.00 -- \$2.00 an hour.  
10 Q How did you -- was your work regular?  
11 A It was pretty regular, yes.  
12 Q How many days a week would you work?  
13 A Five, six.  
14 Q Do you know anything about Karen Merry?  
15 A No, I don't know her.  
16 Q Referring to this diagram, State's Exhibit A,  
17 which was discussed yesterday, are you familiar with the  
18 area:--  
19 A Yes.  
20 Q -- that this represents?  
21 A Yes.  
22 Q Have you ever lived in this area?  
23 A Yes.  
24 Q Could you for the jury -- could you point out if you  
25 can find your residence on here -- where that is?

(222)

1 A Yes, I have.  
2 Q Would it be correct to say that when you were  
3 incarcerated in our jail on this past safecracking charge  
4 from 2-3-78 to 8-28 that you ordered 183 packs of Kools?  
5 A I have no idea, no.  
6 Q But you would have no reason to doubt that because  
7 you were smoking Kools at that time?  
8 A I don't remember that.  
9 Q You don't remember whether you were or not?  
10 A (WITNESS SHOOK HEAD INDICATING NO).  
11 Q And that -- would it also be unfair to say that  
12 since you came back in September -- from 9-2-81 to 9-20-81  
13 that you ordered from the commissary 12 packs of Kools?  
14 A I don't remember. I just got a carton of Camels  
15 a couple days ago. Do you have that down on your list?  
16 Q Well, that's a point I would like to make. In  
17 preparation for this trial I sent to Mr. Graham a notice  
18 that I was going to use a Kool cigarette as part of the  
19 case and since that time you indicate that you have been  
20 ordered Camels.  
21 A I did, yes. Mr. Graham never told me that.  
22 Q You can't recall in '78 whether you were a  
23 cigarette Kool smoker or not?  
24 A (WITNESS SHOOK HEAD INDICATING NO). No, sir.  
25 Q Is that a commissary record as you know it?

(231)

1 MR. SMITH: That's what you tell me, I can't  
2 put my case up but yet you let --  
3 THE COURT: Let me inquire of you. If  
4 I would have adhered to rules of procedure  
5 I would not have permitted Mr. Drzewiecki to  
6 testify in this case.  
7 MR. SMITH: I understand.  
8 THE COURT: But I did permit him to testify  
9 and so that is the situation. That's the way  
10 it's going to be. If we have another outburst  
11 we will finish your proceeding in this case  
12 without having you present.  
13 MR. SMITH: If I'm not allowed to call  
14 my witnesses, then I'll leave court.  
15 THE COURT: You will remain right  
16 here --  
17 MR. SMITH: He'll take me back.  
18 THE COURT: -- and sit next to your  
19 counsel and cooperate with your counsel.  
20 MR. GRAHAM: Your Honor, --  
21 THE COURT: Let me say one more word --  
22 I don't know whether I told you this; I doubt  
23 it -- as I said to you yesterday I don't have  
24 any preferences in this thing one way or  
25 another. I didn't know you prior to the  
(242)

1 time you appeared in my court to enter  
2 a plea. I didn't have any prior knowledge  
3 of you other than rumor. I don't let rumor  
4 influence me. But I would just say to you  
5 that this -- I have to be the judge and make  
6 the rulings in this case. Now if they're wrong,  
7 as I said to you, nobody will try to correct me.  
8 The objections will be made legally, the rulings  
9 will be made and if they're wrong then they're  
10 wrong but this case is going to proceed and  
11 it's certainly in your best interest to present  
12 to the jury in this case a picture of someone  
13 who is interested and cooperative.

14 MR. SMITH: How can I do that? You block  
15 me.

16 THE COURT: And you have done so so far. The  
17 Court, as I say, hopes that you continue to do that.

18 MR. SMITH: I can't do that; you block  
19 me.

20 THE COURT: We will recess -- this  
21 Court will recess.

22 MR. BOOTH: All right.

23 WHEREUPON, THE TRIAL WAS IN RECESS

24 FROM 2:35 P.M. TO 2:50 P.M.

25 MR. BOOTH: Be seated.

(243)

A60

1 WHEREUPON, THE JURY WAS NOT PRESENT  
2 DURING THE FOLLOWING PROCEEDING.

3 THE COURT: It is my understanding  
4 that you want to make a request to the  
5 Court at this time to withdraw from the  
6 case, is that correct?

7 MR. SMITH: Yes.

8 THE COURT: That has been communicated  
9 to me that you voluntarily wish to remove  
10 yourself from the courtroom. Are there  
11 any statements concerning that from the  
12 prosecutor?

13 MR. WOLFE: May it please the Court,  
14 I wish to continue to cross-examine the  
15 defendant and since he's had the opportunity  
16 to take the stand and to present his case  
17 on direct examination, certainly that hampers  
18 our ability to attack his credibility.

19 THE COURT: Mr. Graham, do you have  
20 anything you would like to say?

21 MR. GRAHAM: Yes, your Honor. If it  
22 please the Court, my client has indicated to  
23 me that it is his desire to testify no longer.  
24 He is angry and upset at the rulings of the  
25 Court as the Court is aware. He has requested

(244)

A61

1 of the Court permission to leave the  
2 courtroom. Prior to the Court making  
3 any decision on his personal request I  
4 would like to make it known to the Court  
5 that his request to remove himself was  
6 made not upon the recommendation of  
7 his counsel.

8 THE COURT: You understand that, Mr.  
9 Smith, this this is legally a request  
10 that is made by you without the agreement  
11 or recommendation of counsel?

12 WHEREUPON, THE WITNESS NODDED HEAD  
13 INDICATING YES.

14 THE COURT: And you state again for  
15 the purpose of the record that you wish to  
16 be removed from the court at this time and  
17 we would try you in your absence, is that  
18 correct?

19 MR. SMITH: If the Court don't let me  
20 call my witnesses in.

21 THE COURT: Well, the Court has already  
22 made a ruling on that but you are stating  
23 that you wish to remove yourself at this  
24 time?

25 MR. SMITH: Yes.  
(254)

1 THE COURT: All right. Over the  
2 objection of the prosecuting attorney and  
3 over the recommendation contrary of that  
4 the Court is going to grant that request  
5 due to the fact that you are the defendant  
6 in this case and if you wish to remove  
7 yourself from the courtroom, that is your  
8 request and that is in the interest of  
9 justice. If you wish the Court will proceed  
10 with the trial in your absence and so the  
11 defendant may be removed at this time. I  
12 might point out before you leave for the  
13 record that if you should desire to return  
14 to the courtroom at any time with the under-  
15 standing that you would cooperate with your  
16 counsel and refrain from any further outbursts,  
17 then the Court would discuss that with you  
18 at that time and I would probably bring you  
19 back. Do you understand what I'm saying?

20 WHEREUPON, THE WITNESS NODDED HEAD  
21 INDICATING YES.

22 THE COURT: All right, then.

23 MR. GRAHAM: May counsel once again  
24 approach the bench, your Honor?

25 WHEREUPON, COUNSEL AND THE REPORTER

1 APPROACHED THE BENCH AND THE FOLLOWING  
2 TRANSPIRED.

3 MR. GRAHAM: At this time the defense  
4 would renew its objection to the ruling of  
5 the Court prohibiting those witnesses to  
6 testify that were listed in Mr. Smith's  
7 personal request put into the court on the  
8 morning of trial and those witnesses were  
9 listed in the supplementary response to  
10 discovery filed the morning of trial and  
11 presented to the prosecuting attorney but  
12 that's on the morning of the trial, those  
13 names being Karen Clapper and Lura Smith.  
14 I would like at this time, if there's no  
15 objection, to be permitted to proffer into  
16 the record that testimony that these women  
17 would have provided this Court.

18 THE COURT: The Court would permit the  
19 proffer. I will, of course, not sustain this  
20 objection to my rulings but I will permit  
21 you to proffer such evidence into the record  
22 if you wish.

23 MR. GRAHAM: Thank you very much.

24 THE COURT: Do you want to do that by  
25 statement as to what they would testify to?

---

(247)

1 MR. GRAHAM: If that's permissible to  
2 the Court.

3 THE COURT: Yes. Would that be  
4 all right?

5 MR. WOLFE: I guess that's all right.

6 MR. GRAHAM: Your Honor, if either  
7 of these individuals had been permitted to  
8 testify their testimony would have been  
9 nearly identical. Mrs. Lura Smith is the  
10 mother of the defendant Larry Raymond Smith  
11 and Mrs. Lura Smith would have been able to  
12 tell the Court that during the months of  
13 October, November<sup>27</sup> and December of 1980  
14 she resided in Zanesville, Ohio in the family  
15 home which she lived in for many years and  
16 that in that home and on her telephone she  
17 received telephone calls from her son who  
18 called collect from Florida and that these  
19 phone calls more specifically did occur  
20 during the month of November. The testimony  
21 of Mrs. Karen Clapper would have been identical  
22 to that in that Mr. Larry Smith called her home  
23 during the months of October, November and  
24 December, calling collect, and those calls  
25 being made from Florida. And with that that

---

(248)

1 would be the end of my proffer as to their  
2 testimony.

3 MR. WOLFE: Are you done?

4 MR. GRAHAM: I'm done with my proffer  
5 to that testimony.

6 MR. WOLFE: I would object to the proffer  
7 of that testimony for the record, that it  
8 should have been made at the time of the  
9 original motion on the first day of trial  
10 and also for the fact that it's a self-serving  
11 declaration to which the prosecutor has never  
12 been able to verify.

13 MR. GRAHAM: If I might remind the Court,  
14 the question of the -- whether these women  
15 could testify was reserved for later judgment  
16 and was not made on the morning of trial.

17 THE COURT: Okay. The reason for the  
18 Court's ruling was the fact that the prosecutor  
19 was not furnished with the names of these witnesses  
20 in a timely fashion.

21 MR. WOLFE: No telephone records.

22 THE COURT: And given the opportunity to  
23 verify such information prior to trial and  
24 the Court sees no reason to change its opinion  
25 concerning that fact. The facts remain the same,

(249)

A66

1 THE COURT: Members of the jury, I would  
2 like to inform you the trial will proceed at  
3 this time but I think in order so that you  
4 understand the situation, the defendant Mr.  
5 Smith has voluntarily requested that he not  
6 be present for the remainder of the trial and  
7 the Court has granted his request.

8 MR. GRAHAM: Your Honor, with that the  
9 defense will rest.

10 THE COURT: Any rebuttal?

11 MR. WOLFE: Yes, your Honor, we have  
12 rebuttal. We would like to call Andrew Nash.

13 ANDREW NASH,

14 being first duly sworn, as provided by law, was examined and  
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. WOLFE:

18 Q Will you state your name and occupation, please?

19 A Andrew H. Nash, Special Agent with the F.B.I.

20 Q And how long have you been employed in that  
21 capacity?

22 A About three years.

23 Q And you were just sworn to testify, is that correct?

24 A Pardon me?

(250)

A67

**OPINION**

## SUPREME COURT OF THE UNITED STATES

LARRY RAYMOND SMITH v. ARNOLD R. JAGO,  
SUPERINTENDENT, LONDON CORRECTIONAL  
INSTITUTION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-5548. March 18, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE BRENNAN join, dissenting.

Despite his claim that he was in Florida at the time of the crime, extensive evidence linked petitioner Smith to a rape he was charged with committing in Ohio. Pursuant to Rule 16(c) of the Ohio Rules of Criminal Procedure, the state requested reciprocal discovery from the defense, and the trial court ordered petitioner to provide full discovery by October 30, 1981. On November 11, 1981, shortly after petitioner was returned from another prison to the jail of the county where he was to be tried, petitioner met with his defense attorney to discuss his case, which would be heard the next day. Petitioner then told his attorney that there were three alibi witnesses he wished to call at the trial, and the attorney orally informed the prosecutor's office of the name of one of these witnesses. The day of trial, petitioner formally filed discovery listing all three witnesses. The trial court allowed the testimony of the first witness, a convicted felon who testified that petitioner was in Florida, not Ohio, shortly before and after the rape. But the trial judge excluded the testimony of the other two witnesses because of petitioner's failure to inform the prosecutors of their testimony earlier. According to the proffer of testimony, the excluded witnesses would testify that petitioner had called them repeatedly from Florida, where he was living during the month the rape oc-

3 pp

curred, and that the telephone calls could be substantiated by phone company records.

Petitioner was convicted of rape, and he subsequently filed a petition for a writ of habeas corpus in federal court. Habeas relief was denied by the District Court, and the Court of Appeals for the Sixth Circuit affirmed, finding that the trial court's exclusion of the alibi witnesses' testimony was a constitutionally permissible sanction for petitioner's failure to timely comply with the reciprocal discovery request.

The exclusion of defense witnesses because a defendant failed to produce their names before a procedural deadline raises a substantial question implicating the Sixth Amendment right of the accused to present witnesses on his own behalf. We have twice left this question open, *Wardius v. Oregon*, 412 U. S. 470, 472, n. 4 (1973); *Williams v. Florida*, 399 U. S. 78, 83, n. 14 (1970), and there are those who have found arguable constitutional infirmity in such exclusionary sanctions. See, e. g., 2 ABA Standards for Criminal Justice § 11-4.7(a) and accompanying commentary (2d ed. 1980); Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 838-839 (1976); Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 137-139 (1974); Note, 81 Yale L. J. 1342 (1972). Another federal Court of Appeals has explicitly ruled "that the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." *United States v. Davis*, 639 F. 2d 239, 243 (CA5 1981). Accord, *Hackett v. Mulcahy*, 493 F. Supp. 1329 (D. N.J. 1980). See also *Ronson v. Commissioner of Corrections*, 604 F. 2d 176 (CA2 1979). Similar provisions allowing the sanction of testimony exclusion for failure to comply with a discovery request exist in many, if not most other states. See *Taliaferro v. State*, 456 A. 2d

29, 35 (Md.), cert. denied, — U. S. — [103 S. Ct. 2114] (1983).

This case thus presents a constitutional issue of widespread importance, one we have left unresolved, and one over which the Courts of Appeals are divided. I would grant certiorari and resolve this issue, which will surely not disappear of its own accord.

JUSTICE POWELL took no part in the consideration or decision of this case.